FILE COPY

FILED
SEP 26 193
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

FITZGERALD HALL,
Counsel for appellant.

W. A. MILLER,
S. M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
of Counsel.

September 30, 1932.

(File No. 36,873)

INDEX.

	PAGE
Preliminary statement	1-4
Federal questions involved	2-4
Jurisdiction	5
Statement of the case	6-14
Original bill	6-13
Demurrer	13
Opinions of Supreme Court of Tennessee	13-14

Specification of errors:

I. A state cannot under the commerce and due process clauses impose upon a railroad a tax for the privilege of doing a business which said railroad neither does in fact nor can do under its charter and the general law ---------- 15

II. A state cannot under the commerce and due process clauses segregate the use of materials, such as coal, water, steel and gasoline, essential to interstate railroad operation, so as to make the consumption of each a separate business on which can be imposed a separate privilege tax ---------- 15

III. To directly tax the use of a commodity, such as gasoline, essential to and consumed in interstate railroad operation violates the commerce clause of the Federal Constitution ---------- 16

IV. Tennessee cannot tax gasoline purchased outside of Tennessee and actually used in Alabama, Kentucky and Georgia merely because it passes through the Railway's shops at Nashville, Tennessee, for inspection as to quality and quantity ---------- 16

V. Tennessee cannot under the commerce clause or the Fourteenth Amendment charge the Railway the same amount per gallon for gasoline used on its own private property in railroad operation as it charges competing common carriers by motor vehicle for gasoline consumed on the public highways, all such funds going to the construction and maintenance of such public highways ---------- 16-17

VI. The relative "economic weight" of the aggregate tax burden on railroads in Tennessee is over four hundred per cent greater than on competing common carriers

PAGE

by motor vehicle, thus violating both the due process and equality clauses of the Fourteenth Amendment... 17

Argument ... 18-72

Preliminary statement ... 18-20

Summary of argument ... 20-23

I. The state statutes under attack impose an excise tax for the privilege of doing an intrastate gasoline business which appellant Railway neither does nor can legally do ... 23-30

II and III. A state cannot by any device constitutionally impose a direct burden on interstate commerce... 30-43

The burden imposed by the statutes under attack is not based either on use or sales in Tennessee, so that such cases as *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147, are irrelevant ... 35-36

Eastern Air Transport, Inc. v *South Carolina Tax Commission*, 285 U. S. 147... 36-37

Gregg Dyeing Co. v. *Query*, 52 S. Ct. 631, 286 U. S. 472 ... 37-39

East Ohio Gas Co. v. *Tax Commission*, 283 U. S. 465 39-41

Helson and Randolph v. *Kentucky*, 279 U. S. 245, seems to control this case ... 41-43

IV. Gasoline purchased outside Tennessee, consumed in Kentucky, Alabama and Georgia, cannot be taxed by Tennessee merely because it passes through the Railway's storehouse at Nashville for inspection as to quality and quantity by the Railway's purchasing agent... 44-46

V. The financial burdens imposed by the statutes under attack are in fact charges by the State as compensation for the use of its highways, as distinguished from taxes proper, thus making the Railway pay for something it does not use ... 47

VI. The relative "economic weight" of the aggregate tax burden in Tennessee imposed on railroads is over four hundred per cent greater than that imposed on competing common carriers by motor vehicle... 52-72

Appendix:

Chapter 58, Acts of Tennessee of 1923... 73-81

Chapter 67, Acts of Tennessee of 1925... 82-83

TABLE OF CASES CITED.

PAGE

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71..... 41, 46
Alabama & Vicksburg Ry. v. *Jackson & Eastern Ry.*, 271 U. S. 244, 250 30
Alward v. *Johnson*, 282 U. S. 509, 513-514..... 50
American Airways, Inc. v. *Roy C. Wallace, Comptroller*, 57 Fed. (2) 877 ..... 13, 25, 35
Bank v. *Senter*, 149 Tenn. 569..... 26
Bekins Van Lines v. *Riley*, 280 U. S. 80..... 50
Boeing Air Transport v. *Edelman*, 51 Fed. (2) 130..... 50
Bowers, Executor, v. *Lawyers Mortgage Co.*, 285 U. S. 182, 190 28
Bowman v. *Continental Oil Co.*, 256 U. S. 642, 647, 648..... 35
Carley & Hamilton v. *Snook*, 281 U. S. 66, 71..... 50
Carson Petroleum Co. v. *Vial*, 279 U. S. 95..... 45
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366..... 45
Chicago Board of Trade v. *Olsen*, 262 U. S. 1, 35..... 45
Clark v. *Poor*, 274 U. S. 554, 557..... 49
Colorado v. *United States*, 271 U. S. 153, 162-163..... 32
Consolidated Southwestern Cases, 185 I. C. C. 357, 361..... 70
Continental Baking Co. v. *Woodring*, 286 U. S. 352, 52 S. Ct. 595, 599 50
Co-ordination of Motor Transportation, Docket No. 23400, 182 I. C. C. 263..... 70
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 297..... 34
Crooks v. *Harrelson*, 282 U. S. 55, 61..... 23
Cumberland Coal Co. v. *Board*, 284 U. S. 23..... 67
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 290-292 45
Dane v. *Jackson*, 256 U. S. 589, 598-599..... 68
Doty v. *Telephone Co.*, 123 Tenn. 329, 338-339..... 25
East Ohio Gas Co. v. *Tax Commission*, 283 U. S. 465, 470..33, 34, 39
Eastern Air Transport, Inc. v. *South Carolina Tax Commission*, 285 U. S. 147 ..... 35, 36
First National Bank of Hartford v. *Hartford*, 273 U. S. 548, 560 66
Foster & Creighton v. *Graham*, 154 Tenn. 412..... 18, 26

PAGE

Foster-Fountain Packing Co. v. *Haydel*, 278 U. S. 1, 10..... 32
Frost v. *Railroad Commission*, 271 U. S. 583, 592..... 30
Furst v. *Brewster*, 282 U. S. 493, 497-498..... 40, 45
Georgia Power Co. v. *Decatur*, 281 U. S. 505, 508..... 29
Goldsmith v. *Prendergast Construction Co.*, 252 U. S. 12, 17.. 69
Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 52 S. Ct. 631, 635 ..... 37, 61, 66, 71
Hanover Fire Insurance Co. v. *Eisman*, 45 Okla. 639, 146 Pacific 214, 218 27
Hart Refineries v. *Harmon*, 278 U. S. 499..... 41
Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 257, 259..... 33, 69
Helson & Randolph v. *Kentucky*, 279 U. S. 245..... 41
Hendrick v. *Maryland*, 235 U. S. 610, 622-624..... 50
Hill v. *Whitice*, 149 Tenn. 168..... 26-27
Hopkins v. *Southern California Telephone Co.*, 275 U. S. 393, 403 60
International Paper Co. v. *Massachusetts*, 246 U. S. 135, 141-142 33
International Shoe Co. v. *Shartel*, 279 U. S. 429, 433..... 41
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 251..... 60, 71
Interstate Transit, Inc. v. *Lindsey*, 283 U. S. 183..... 49
Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239, 247 56, 67
Kansas City Southern v. *Road Improvement District*, 256 U. S. 658, 661 51
Klein v. *Board of Tax Supervisors*, 282 U. S. 19, 23..... 57
Knapp v. *Golden Cross*, 121 Tenn. 212, 231..... 24
Lacoste et al. v. *Department of Conservation*, 263 U. S. 545, 550 47
Lawrence et al. v. *State Tax Commission of Mississippi*, 286 U. S. 276, 52 S. Ct. 556, 557-559..... 46-47, 57, 60, 64
Lemke v. *Farmers Grain Co.*, 258 U. S. 50..... 45
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 37-40 69
McFadden et al. v. *Alabama Great Southern*, 241 Fed. 562.. 45
Memphis & Charleston Ry. Co. v. *Pace*, 282 U. S. 241, 246... 68
Michigan Public Utilities Com. v. *Duke*, 266 U. S. 570, 576-578 ..... 30, 50
Mid Continent Air Express v. *Lujan*, 47 Fed. (2) 266..... 35
Missouri v. *Kansas Gas Co.*, 265 U. S. 298, 307..... 31

PAGE

Myles Salt Co. v. *Iberia Drainage Dist.*, 239 U. S. 478..... 51, 63
New Jersey Telephone Co. v. *Tax Board*, 280 U. S. 338, 346, 347 ..... 31, 49
Norfolk & Western R. R. v. *Pennsylvania*, 136 U. S. 114, 120 34
Ohio Oil Co. v. *Conway*, 281 U. S. 146, 159-160..... 40, 57
Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555, 565-567..... 28, 41
Pacific Company v. *Johnson*, 285 U. S. 480, 493..... 66
Panhandle Oil Co. v. *Knox*, 277 U. S. 218, 222..... 32, 46
Prouty v. *Coyne*, 55 Fed. (2) 289, 292..... 41, 48
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 401..... 46
Quicksafe Manufacturing Co. v. *Graham*, 161 Tenn. 46..... 27
Rafferty v. *New Brunswick Fire Ins. Co.*, 3 Harrison (N. J.) 480, 38 American Decisions 525, 529..... 27
Road Improvement District v. *Missouri Pacific*, 274 U. S. 188, 194 ..... 51, 69
St. Louis & Southwestern Ry. v. *Nattin*, 277 U. S. 157..... 51
Shelton v. *Silverfield*, 104 Tenn. 67..... 30
Smith v. *Cahoon*, 283 U. S. 553, 567..... 28, 30
Sprout v. *South Bend*, 277 U. S. 163, 170-171..... 33, 46, 50
Standard Pipe Line Co. v. *Miller County Highway & Bridge District*, 277 U. S. 160..... 51
State Tax Commission of Mississippi v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41..... 40
Texas Transport & Terminal Co. v. *New Orleans*, 264 U. S. 150 32
Thomas v. *Kansas City Southern*, 261 U. S. 481, 483..... 51, 69
Transcontinental & Western Air, Inc. v. *Lujan*, 8 Pac. (2) 103 41
Trentham v. *Moore*, 111 Tenn. 346, 353..... 26
Turner v. *Eslick*, 146 Tenn. 236, 240, 246..... 25, 63
Union Tank Line Co. v. *Wright*, 249 U. S. 275, 286..... 29
United States Airways v. *Shaw*, 43 Fed. (2) 148..... 35
United States v. *La Franca*, 282 U. S. 568, 572..... 47
United States v. *New York Central R. R. Co.* 272 U. S. 457, 464 35
United States v. *Sprague*, 282 U. S. 717, 731..... 23
United States v. *Standard Brewery*, 251 U. S. 210, 217..... 23
Vanderbilt University v. *Cheney*, 116 Tenn. 259, 267-269..... 26
Western & Atlantic R. R. v. *Henderson*, 279 U. S. 639, 642..... 27
Western Cartridge Co. v. *Emmerson*, 281 U. S. 511, 513..... 45

TABLE OF STATUTES CITED.

PAGE

Tennessee Acts, 1845-1846, Chapter 1 24
Tennessee Acts, 1923, Chapter 21 26
Tennessee Acts, 1923, Chapter 58 ..... 1, 6, 7, 15, 23, 48
Tennessee Acts, 1925, Chapter 67 ..... 7, 24
United States Constitution, Commerce Clause 10, 11, 15, 16, 20, 29
United States Constitution, Fourteenth Amendment 11, 12, 13, 14, 15, 16, 17, 20, 23, 29, 30, 59, 62, 70

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

MAY IT PLEASE THE COURT:

Tennessee, commencing with chapter 58 of its 1923 Acts, undertook to finance the construction and maintenance of its highway system through the medium of so-called* gasoline taxes, which the

*As we shall undertake to demonstrate later on (page 47 infra), the charges imposed by these statutes are not taxes proper, but compensation for the use of public highways. As these charges have been generally denominated "taxes," we shall generally do likewise.

Tennessee courts hold to be excise taxes for the privilege of doing a gasoline business, as seller, storer or distributor. (R., 14-16, 18-19)

Appellant Railway uses gasoline in the operation of its railroad throughout the four states in which it does business in such ways and for such purposes as to make an apportionment between that consumed exclusively in interstate commerce and that used solely in intrastate commerce impossible. (R., 16-18) Tennessee undertook to compel the Railway to pay taxes under these statutes *on all such gasoline regardless of where or how used*, so the Railway, pursuant to proper practice in Tennessee, filed a bill to have determined their application, meaning and validity. (R., 12-23)

The only questions here, of course, relate to the challenge to the validity of these state statutes under the Federal Constitution. The following questions arise on this record:

1. Has Tennessee the power to impose upon such an interstate common carrier by railroad as appellant a tax for the privilege of doing a business which it does not do and which under its charter and the laws of Tennessee it cannot legally do?

2. Has Tennessee the power to reduce "railroading" to its constituent elements and impose a

privilege tax on the doing of each—or, to put it another way, because a railroad necessarily uses coal, lumber, steel and gasoline, has a state the power to impose on such a railroad a tax for the privilege of engaging in the coal business, the lumber business, the steel business, or the gasoline business?

3. Has Tennessee the power, regardless of technicalities, definitions and phraseology, to impose a tax upon the use in interstate commerce by a common carrier by railroad of the various commodities consumed in interstate railroad operation, as for example, gasoline? If it cannot so tax the use, can it tax the necessary preliminary step of keeping a few days supply on hand under the fiction that the Railway is thereby a "storer" or "distributor"?

4. Has Tennessee the power to impose on a railroad a privilege tax or any other sort of tax on gasoline neither bought nor consumed within its borders but merely passing through its general storehouse in the State in the normal procurement of supplies for use over its entire system?

5. Can Tennessee impose, not a tax proper, but a charge for the use of the public highways based on the gallons of gasoline consumed; allocate all collections to the construction and maintenance of such highways; and make such charges applicable

to those who do not use the highways at all—or, to put it another way, can Tennessee make the Railway for the use of gasoline used in railroading on its own private property pay the same amount and for the same purpose as if it used such gasoline on the public highways?

6. Has Tennessee the power to enact one system of taxation for common carriers by railroad and another system for the taxation of common carriers by motor vehicle, so that considering the two systems as a whole the "economic weight" of the former will exceed that of the latter over four hundred per cent—or, to put it another way, while the methods of taxation may vary, must all common carriers bear, not exactly, to be sure, but approximately the same relative tax burden or may there be excessive favoritism of one agency of transportation over another?

All these questions were raised by the Railway's original bill in the trial court, to which appellees here filed a demurrer (R., 29) which was sustained and the case appealed directly to the Supreme Court of Tennessee, where the judgment of the trial court was affirmed (R., 8, 12). The Railway has appealed here, there being involved only the validity under the Federal Constitution of these state statutes. (R., 1-6)

JURISDICTION

The Railway on July 20, 1932, filed a separate statement and brief on jurisdiction to comply with the then Rule 12 of this court.

STATEMENT OF THE CASE

The pleadings

Appellant Railway filed a bill in the chancery court of Davidson County at Nashville, Tennessee, to have that series of acts, commencing with Chapter 58 of the 1923 Acts of Tennessee, construed and their validity determined. (R., 12-23)

The original bill as amended made out the following case:

The Nashville, Chattanooga & St. Louis Railway was chartered for the sole purpose of operating a railroad, and is engaged solely in that business, both interstate and intrastate, in the states of Tennessee, Kentucky, Alabama and Georgia. (R., 13, 16) All of its tracks are through highways of interstate commerce and practically every train carries persons or property in interstate commerce. (R., 21) Said Railway engages in no other business—specifically it is not in the gasoline business either as seller, distributor or storer. (R., 16)

Tennesse undertook to finance, in large measure, its highway system by what is generally called a "gasoline tax," though a reading of these statutes demonstrates that the rationale thereof was that the users of the highways should pay *compensation* for the use thereof in proportion to the amount of

gasoline so consumed. (R., 15, 18-19) The first and principal one of these acts is chapter 58 of the 1923 Acts, the caption of which is as follows:

> "AN ACT requiring all persons, firms, associations, joint stock companies, syndicates and corporations *engaged in or carrying on the business in this State of selling gasoline** and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, *such fund to be used solely in the construction and maintenance of a highway system in the State.*"

This act has been amended several times but the principal one is chapter 67 of the 1925 Acts, the caption of which is as follows:

> "AN ACT to amend an Act entitled 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations *engaged in or carrying on the business in this State of selling gasoline* and distillate in this State, to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, *such fund to be used solely in the construction and maintenance of a highway system in the State,*' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by in-

*All italics in this brief are our own.

cluding the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

These two acts are set out in full in the appendix, *infra*, pages 73, 82.

The Railway buys, not in Tennessee, but elsewhere, gasoline in bulk quantities which is delivered in interstate commerce to its general storehouse at its Nashville shops for inspection by it "as to quality and quantity" (R., 16), thence used all over the system as the exigencies of operation require. (R., 16-18, 21) The average amount on hand at any one time is sufficient for about thirty days' use. *All of such gasoline is used in railroad operation exclusively on railroad property.* (R., 16)

The Railway buys some gasoline in Tennessee which is used in its automobiles on the public highways. The tax or charge in question on all such gasoline is paid and that is not involved in this case. (R., 18)

The Railway buys, handles and uses gasoline just as it does coal, ties, lumber, rail and other commodities essential to railroad operation. It is

no more in the gasoline business than it is in the coal or lumber or steel business. (R., 16)

There is no sale of such gasoline within the State of Tennessee. All of that gasoline here involved is purchased from producers outside the state and delivered in interstate shipments to the Railway's shops at Nashville, Tennessee, where there is kept on hand a quantity sufficient, as a rule, for approximately thirty days' use. None of this gasoline is ever sold in the state of Tennessee, nor is it ever used by anyone except the Railway, nor is it ever used on public property, nor is it ever used except in the actual operation of appellant's railroad. The Railway permits no others to use its storage facilities and distributes gasoline to no third parties. (R., 16-17)

This gasoline, as are supplies generally, is delivered to the Railway's storehouse in Nashville where it remains a few days awaiting actual consumption in the states of Tennessee, Kentucky, Alabama and Georgia in interstate railroad operation.

Approximately sixty per cent of such gasoline is consumed in Tennessee and the remaining forty per cent is actually used by the Railway in railroad operation in the states of Kentucky, Alabama and Georgia. (R., 16)

This gasoline is used in essential railroad work on tracks all of which are through highways of interstate commerce, over which run trains practically every one of which carries persons or property in interstate commerce. (R., 17-18, 21) It would not be possible to allocate the consumption as between interstate and intrastate commerce, as the several uses detailed in the bill demonstrate. (R., 16-18)

Railroads in Tennessee are subject to several species of taxes and their common carrier competitors by motor vehicle are likewise subject to several kinds of taxes. The two systems are not identical but, considering the two systems as a whole, the tax burden thereunder on such a railroad as appellant in Tennessee is over four hundred per cent greater than the tax burden of competing common carriers by motor vehicle. The facts showing such disproportionate "economic weight" between these two competing agencies of transportation are fully set out in the original bill and exhibits. (R., 20-22)

On this statement of facts the Railway in its original bill asked that these statutes be construed as non-applicable to the Railway; but, if applicable, that they be held invalid for the following reasons:

(a) Tennessee cannot consistently with the commerce and due process clauses of the Federal

Constitution make the Railway pay an excise tax for the privilege of doing a gasoline business which it neither does in fact nor can, under its charter, or the general law of Tennessee, legally do. Legislative fiat may not under the Fourteenth Amendment substitute fiction for fact. (R., 21-23)

(b) Tennessee cannot segregate the various activities jointly constituting "railroading" so as to require a railroad, such as appellant, to pay a privilege tax on the theory that it is engaged in the gasoline business, or coal business, or steel business, or lumber business, merely because it uses such commodities in operating its railroad. To do this would not only be arbitrary and capricious under the Fourteenth Amendment but an unconstitutional burden on interstate commerce. (R., 21-23)

(c) The gasoline in question is all consumed on the Railway's privately owned property in the operation of its interstate railroad. There is no sale of this gasoline in Tennessee. The Railway permits no others to buy or use it. The Railway stores for and distributes to no third parties. (R., 16) The tax in question, as to appellant, is in essence a tax on the use of gasoline consumed in interstate commerce, thus violating the commerce clause of the Federal Constitution. (R., 20-23) It "stores" and "distributes" such gasoline only as a necessary and incidental step in its consumption in interstate railroad operation. (R., 16-19)

(d) Forty per cent of this gasoline merely passes through the Railway's general storehouse at Nashville. It is not bought in Tennessee—it is not used in Tennessee—it never comes to rest in the legal sense in Tennessee—it is used exclusively by the Railway in Kentucky, Alabama, and Georgia on its own privately owned property in operating its own railroad. To permit Tennessee to tax that gasoline would be so unreasonable as to lack due process of law under the Fourteenth Amendment, besides being a direct and illegal burden on interstate commerce. (R., 20-23, 28)

(e) To charge the Railway for the use of gasoline in operating its interstate railroad the same compensation it exacts of competing common carriers by motor vehicle for actual use of the public highways as a place of business violates the due process and equality clauses of the Fourteenth Amendment. Such charges are in fact compensation for the use of "special facilities" furnished by the State, which "special facilities" the Railway does not use, and are the means of enabling competing motor vehicles to take business which otherwise would be handled by the Railway. (R., 20-23)

(f) Tennessee has adopted two series of statutes or two systems for taxing common carriers—one applicable to railroads — one applicable to motor vehicles. Considering the two systems as a whole, including the statutes here under attack,

that is, the aggregate "economic weight," the relative tax burden in Tennessee on railroads is over four hundred per cent more than that on competing common carriers by motor vehicle. This arbitrary action and this unreasonable discrimination are challenged under the Fourteenth Amendment. (R., 20-23)

Respondent public officials in the trial court filed a demurrer to the bill as amended and the chancellor, without opinion, sustained the demurrer and dismissed the bill. (R., 29, 32) The Railway appealed directly to the Supreme Court of Tennessee. (R., 33)

Opinions of the Supreme Court of Tennessee

In the Supreme Court of Tennessee the Railway advanced the same propositions of law as in the trial court, and in an opinion (R., 7-8), less than a page in length, filed April 30, 1932, that court affirmed the decision of the chancellor, without discussing the questions involved, basing its decision solely on a recent opinion of the United States District Court at Nashville in the case of *American Airways, Inc.* v. *Roy C. Wallace, Comptroller*, 57 Fed. (2d) 877. (R., 8) It is to be noted that a minority of the court did not concur in the reasoning and conclusions of said District Court, but felt that it was the duty of the Supreme Court of Tennessee to conform its decision to that of said court. (R., 8)

Many of the questions presented by the Railway were not involved in said American Airways case, so a petition to rehear was filed (R., 9-11) and the Supreme Court of Tennessee on June 4, 1932, rendered its second opinion in this case. (R., 11-12) Without discussion it held that the tax in question applied to gasoline purchased by the Railway outside of Tennessee, passing through its Nashville shops for inspection, and actually used by the Railway in railroad operation in the states of Alabama, Georgia and Kentucky. (R., 11-12)

The court likewise held that the particular statutes here under attack applied alike to all affected thereby so that the Fourteenth Amendment was not violated. That court apparently attached no importance to the fact that the so-called tax in question was really compensation for the use of the public highways which the Railway did not use; and that a comparison between the two systems of taxes as a whole—one applicable to railroads and one to motor carriers—showed arbitrary, indefensible and material favoritism to the latter. (R., 11-12)

The Railway thereupon perfected its appeal to this court making the same federal questions here which it made in the trial court and in the Supreme Court of Tennessee. (R., 1-6)

SPECIFICATION OF ERRORS

I.

Chapter 58 of the 1923 Acts of Tennessee, as amended, violates the commerce clause of the Federal Constitution and the Fourteenth Amendment thereto in that it undertakes to require appellant Railway to pay an excise tax for the privilege of doing a gasoline business, which business the Railway does not do and cannot under its charter and the laws of Tennessee legally do. The mere use of gasoline in carrying on interstate commerce by a railroad cannot be distorted by statute into the carrying on of a separate and distinct business for which a railroad can be forced to pay a *special privilege tax.* (R., 2-5)

II.

A state has no power under either the commerce clause or the Fourteenth Amendment to segregate the use of the many commodities essential to interstate railroad operation so as to make the consumption of each a separate business on which it can impose a separate privilege tax. (R., 2-5)

III.

Said series of acts violate the commerce clause of the Federal Constitution because, stripped of phraseology and terminology, the practical operation and effect is to impose a direct tax on the use of a commodity essential to and consumed in interstate railroad operation. (R., 2-5)

IV.

Tennessee cannot under either the commerce or due process clause of the Federal Constitution impose a tax on gasoline which is neither bought nor used in Tennessee but merely passes through the Railway's general storehouse in Nashville, Tennessee, for actual consumption in Alabama, Georgia, and Kentucky as the exigencies of railroad operation require. (R., 2-5)

V.

Tennessee has undertaken to finance its highway system by making those who use it pay compensation therefor in proportion to the gasoline consumed thereon. This is the legal equivalent of a special assessment for special benefits.

To force appellant Railway to pay compensation (as distinguished from general property taxes) for the use of "special facilities" furnished by

the State, which it does not use is arbitrary action; to charge those who do use and those who do not use such "special facilities" the same compensation for such use is both arbitrary action and unreasonable discrimination; to make the railroads thus build and maintain roadways for their common carrier competitors is an illegal burden on interstate commerce by railroad. (R., 2-5)

VI.

Tennessee has adopted two separate systems, each made up of several separate statutes, for the taxation of common carriers by railroad and common carriers by motor vehicle. Considering the two systems, each in its entirety, including the series of statutes here under attack, the tax burden on railroads in Tennessee is over four hundred per cent greater than the tax burden on competing common carriers by motor vehicle. This gross disparity in "economic weight" is arbitrary action and unjust discrimination under the Fourteenth Amendment. (R., 2-5)

ARGUMENT

The difficulty in the case at bar is that the statutes under attack clearly say one thing—and clearly mean another. They were devised to make road users pay compensation for the use of "special facilities" furnished by the State measured by the volume of gasoline consumed.

The Tennessee legislature, apparently thinking only of filling stations, undertook to make those actually in the gasoline business collect from the road users — and pay such collections over to a *special fund* "to be used solely in the construction and maintenance of a highway system in the State" as privilege taxes. The road user actually pays and knows and understands that he is so paying. (R., 18-20)

The trouble arose when it was found that some non-road users consumed large quantities of gasoline. Unfortunately the test case of *Foster and Creighton* v. *Graham*, 154 Tenn. 412, involved a *road user*—and the statutory charge was properly sustained but *on the wrong grounds.* This is the genesis of all our trouble.

Appellant Railway has automobiles using the public highways and pays and should pay compensation for such use as these statutes provide. (R., 18)

But the Railway uses other gasoline on its own private property in railroad operation—this was a contingency which obviously the legislative mind did not anticipate.

This gasoline is bought outside Tennessee and moves in bulk quantities in interstate commerce to the Railway's storehouse in Nashville, Tennessee, for checking by the Railway "as to quality and quantity." (R., 16) At any given time sufficient for about thirty days use is on hand. (R., 16) Then it is used—about sixty per cent in Tennessee, about forty per cent in Georgia, Alabama, and Kentucky. The movement is substantially continuous and differs not at all from the purchase and use of coal, lumber, steel and other commodities necessary to railroad operation. (R., 16)

All of the Railway's lines are through highways of interstate commerce—practically every train is engaged in handling interstate commerce. (R., 21) Typical uses are detailed in the original bill, showing that it would be impossible to separate gasoline consumed in interstate commerce from that consumed in intrastate commerce. (R., 17-18)

The Tennessee Supreme Court's opinion held that all such gasoline, even that used in Georgia, Alabama, and Kentucky, was subject to the burden of these statutes. (R., 11)

This is the situation and, in the light thereof, we thus summarize our argument.

Summary of argument

1. If these statutes are taken literally and construed to mean exactly what they say, namely, that they impose privilege taxes for the doing of a gasoline business, then appellant Railway may not consistently with the due process and commerce clauses of the Federal Constitution be taxed thereunder, as it is not engaged in the gasoline business and can, under its charter and the laws of Tennessee, engage in no business except that of operating a railroad.

2. The operation of a railroad involves the doing of many different things, all tending to the same end, namely, the transportation of persons and property. A state cannot under said due process and commerce clauses reduce "railroading" to its basic elements and claim that, because a railroad uses steel, water, lumber, gasoline and coal, it is engaged in the steel business, the water business, the lumber business, the gasoline business, and the coal business; and, having made this artificial separation by legislative fiat, it cannot then impose a separate privilege tax—wholly distinct from the privilege of doing an intrastate railroad business—on the doing of each of these various things.

3. There is no sale in Tennessee of the gasoline here involved and none of it is consumed on public property, but all of it is used on privately owned railroad property in railroad operation. While the Railway does both an interstate and intrastate business, there is no practicable way to so separate the gasoline thus used. It is consumed in the same way as coal in the fire box of a locomotive or water in its boiler. As there are no local sales, as the gasoline is not used in a local business, as it is not consumed on the public highways, to impose a tax on the use of this gasoline—the amount of the so-called tax increasing as interstate business increases—results, in practical operation and effect, in a direct burden on interstate commerce.

4. Forty per cent of the gasoline in question stops only a few days at the Nashville shops in Tennessee for inspection—then moves out in interstate commerce for consumption in Alabama, Georgia and Kentucky. This gasoline never comes to rest, in the technical sense, in Tennessee, but merely passes through the Railway's general storehouse in Tennessee in substantially a continuous movement in regular course of business. Such gasoline certainly under no conditions may be taxed by the State of Tennessee.

5. The charges imposed by these statutes are not general property taxes—nor taxes on local sales nor on the doing of a local business. They are nothing more or less than compensation for the

use of "special facilities" furnished at great expense by the state. It is not due process of law to force a citizen to pay compensation (as distinguished from a tax) for something it does not use.

To make a railroad (wholly separate from taxes proper) thus help construct and maintain highways for its competitors by motor vehicle—making those using and those not using the highways pay on exactly the same basis—is so palpably arbitrary as to lack due process of law and so viciously discriminatory as to deny it the equal protection of the laws; and is a burden on interstate commerce.

6. Common carriers by railroad in Tennessee are subject to various taxes which together constitute one system—common carriers by motor vehicle are subject to various taxes and these jointly constitute another system. It is entirely proper for the state thus to classify; and it is not indispensable that the ultimate burden or "economic weight" on common carriers by railroad and common carriers by motor vehicle be exactly the same. But it is indispensable that the tax burden on these two competing businesses be in their ultimate effect relatively the same. However, the system in Tennessee as applicable to railroads imposes a burden, everything considered, over four hundred per cent greater than the system applicable to common carriers by motor vehicle.

This is arbitrary action and indefensible discrimination under the Fourteenth Amendment.

With this summary of our views we proceed in some detail to enlarge upon them.

I.

The state statutes under attack impose an excise tax for the privilege of doing an intrastate gasoline business which appellant Railway neither does nor can legally do.

The rules for the construction of these statutes are simple. In *United States* v. *Standard Brewery*, 251 U. S. 210, 217, this court said: "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written. . . ."—or, as said in *United States* v. *Sprague*, 282 U. S. 717, 731, ". . . . where the intention is clear there is no room for construction. . . ." Again, in *Crooks* v. *Harrelson*, 282 U. S. 55, 61, this court said: "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring *adherence to the letter* applies with peculiar strictness. . . ."

The caption of chapter 58 of the 1923 Acts requires corporations "engaged in or carrying on the business in this State of selling gasoline . . . .

to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State. . . ."

Chapter 67 of the 1925 Acts amends the caption of said chapter 58, just quoted, by adding after the word "selling" the words "or storing or distributing." Language could not be plainer. "Adherence to the letter" demonstrates that this tax is to be paid only by those engaged in the gasoline business.

(a) Appellant's charter is a public act of Tennessee, namely, chapter 1 of the Acts of 1845-1846. (R., 13) Section 1 thereof provides: "That for the purpose of establishing a communication by railroad . . . . the formation of a company is hereby authorized . . . . by the name and style of 'The Nashville & Chattanooga Railroad Company' . . . ."

Neither this original charter nor any amendments authorize it to engage in any business except the railroad business. There is no general statute in Tennessee authorizing a railroad to engage in any other business.

In Tennessee corporations have no powers except those contained in their charters or granted by the general laws of the land. The rule is thus stated in *Knapp* v. *Golden Cross*, 121 Tenn. 212, 231, where the Tennessee Supreme Court said:

> "Corporations are creatures of the legislative department of the government, and exist solely and alone by virtue of the act of incorporation. They can exercise no powers which are not expressly granted them, or are necessarily implied from the express powers given. Authority for all their acts must be found in their charters, or the general laws of the State of their creation. Where the charter or law is silent as to the power sought to be exercised, it does not exist; and wherever a grant of corporate power is claimed by a corporation, it must clearly appear and will not be inferred or presumed."

This is the rule of law steadfastly maintained in Tennessee. See also *Doty* v. *Telephone Co.*, 123 Tenn. 329, 338-339, and *Turner* v. *Eslick* 146 Tenn. 236, 240. It is perfectly obvious, therefore, that under the charter and laws of Tennessee appellant Railway cannot engage in the gasoline business.

(b) The Supreme Court of Tennessee in its opinion (R., 8) based its decision, without comment, on *American Airways, Inc.*, v. *Roy C. Wallace, Comptroller*, 57 Fed. (2d) 877. That court, relying on the decisions of the Tennessee Supreme Court, thus construed the laws in question:

> "The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax *upon the business* of storing and withdrawing the gasoline

and the amount is computed upon withdrawals.

. . . . . .

"The Tennessee statute imposes an excise or privilege tax upon the business of storing and distributing gasoline, and this tax accrues whether the gasoline is used in interstate commerce or otherwise . . . .

"It is simply *a privilege tax upon engaging in a business within the state*, and applies to all persons, firms or corporations doing a like business."

This decision of the United States District Court, so far as it construed the Tennessee statutes, was approved by the Tennessee Supreme Court (R., 8), and was in conformity with *Foster and Creighton* v. *Graham*, 154 Tenn. 412.

(c) In Tennessee the mere ownership, use or enjoyment of property cannot be made a taxable privilege. *Vanderbilt University* v. *Cheney*, 116 Tenn. 259, 267-269. Incidental activities are not enough—a corporation must "make a business" of doing something to constitute the basis of a privilege tax. *Trentham* v. *Moore*, 111 Tenn. 346, 353. An excise tax and a privilege tax are one and the same and constitute a tax, not on property, nor on sales, nor on the use of property, but on the "*doing of business.*" Appellant Railway pays a privilege tax on its intrastate railroad business under chapter 21, 1923 Acts of Tennessee. (R., 22) See *Bank* v. *Senter*, 149 Tenn. 569; *Hill* v.

Whitice, 149 Tenn. 168; and *Quicksafe Manufacturing Co.* v. *Graham*, 161 Tenn. 46.

(d) The Railway never sells any gasoline—it does keep a few days supply on hand for itself. It is no more engaged in the storage business than a housewife who keeps some thirty days supply of kerosene on hand. Compare *Rafferty* v. *New Brunswick Fire Ins. Co.*, 3 Harrison (N. J.) 480, 38 American Decisions 525, 529, and *Hanover Fire Insurance Co.* v. *Eisman*, 45 Okla. 639, 146 Pacific 214, 218. It stores no gasoline for others and no others use any of it. (R., 16)

The Railway after buying this gasoline distributes it over its system as the exigencies of operation requires. It is handled just as other railroad supplies. No third parties ever use any. (R., 16)

(e) It thus being apparent that the Railway does not in fact do a gasoline business, (R., 16-18) and that under its charter and the laws of Tennessee it *could not engage in the business of selling, storing or distributing gasoline*, the question arises whether the state has the power by legislative enactment to make a railroad pay a privilege tax for the doing of a business which it neither does in fact nor can legally do under the law.

In *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642, this court said: "Legislative

fiat may not take the place of fact in the judicial determination of issues involving life, liberty and property." In *Smith* v. *Cahoon*, 283 U. S. 553, 567, this court held that a state had no power by legislative act to change the business of a private carrier into that of a common carrier.

In *Bowers, Executor*, v. *Lawyers Mortgage Co.*, 285 U. S. 182, 190, this court said:

> "Respondent's business is one which may be and is in fact carried on by corporations organized under the New York banking laws. The element of insurance may not properly be regarded as more than an incident thereof; it certainly is not sufficient to make respondent an 'insurance company' within the meaning of that phrase as it is commonly used and understood. . . .
>
> "In the case before us, respondent's charter authority extended not only to the business of insurance but also to other lines, including that of investment, with or without guaranties as it might choose. As above shown, the element of guaranty involved in its transactions in the tax years was not sufficient to make it an insurance company."

Under that decision the use of gasoline in railroad operation, *and its incidental storage and distribution*, do not change the character of appellant's business from railroading to gasoline.

In *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, 566-567, this court said: ". . . . the

power to tax depends upon what was done and not upon what might have been done. Moreover, the license issued by the State authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.' "

If appellant Railway had sold gasoline or stored for or distributed to others in violation of its charter and of the general law, whether a privilege tax for doing these unlawful acts could be imposed is not here involved. The point is the Railway is not as a fact in the gasoline business. (R., 16)

In *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 286, this court said: "Taxes must follow realities . . . ." What could be more unreal than to impose upon The Nashville, Chattanooga & St. Louis Railway a tax for the privilege of doing a business which it neither does in fact nor can do under the laws of the state where it was chartered. These statutes, we assert, being applicable, as the Supreme Court of Tennessee held, to appellant Railway, are as to it in violation of the due process and commerce clauses of the Federal Constitution.

The Fourteenth Amendment applies to all state agencies, *Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508, and inhibits Tennessee from enforcing a statute against appellant Railway applicable only to those "engaged in or carrying on the business in this State of selling or storing or distributing gasoline. . . ."

Certainly nothing could be more shocking to the sense of fair play ordained by the due process clause of the Fourteenth Amendment than to make a railroad pay a privilege tax for doing a railroad business measured by its intrastate business (R., 22); and then, by legislative fiat, undertake to make the various acts constituting "railroading" in the aggregate into separate businesses, for the doing of each of which a separate privilege tax is charged. See *Shelton* v. *Silverfield*, 104 Tenn. 67; *Michigan Public Utilities Com.* v. *Duke*, 266 U. S. 570, 576-578; *Frost* v. *Railroad Commission*, 271 U. S. 583, 592; and *Smith* v. *Cahoon*, 283 U. S. 553, 567.

II and III

A state cannot by any device constitutionally impose a direct burden on interstate commerce.

If we ignore the clear phraseology of these statutes and their construction by the Tennessee Supreme Court and look only to their practical operation and effect with reference to appellant, it would seem obvious that, to the extent they apply to gasoline consumed in railroad operation, they are invalid under the commerce clause of the Federal Constitution—and that is a question for this court to decide. *Alabama and Vicksburg Railway* v. *Jackson and Eastern Railway*, 271 U. S. 244, 250.

We repeat for emphasis that all the gasoline in question is used in railroad operation on railroad property and none of it on the public highways. The bill of complaint details numerous uses of this gasoline; for example, the employees who inspect automatic signals and track use this gasoline in little motor cars running up and down the line. (R., 17) Every track is a through highway of interstate commerce and practically every train carries interstate passengers or freight. (R., 21) Obviously there is no way to segregate that part of the gasoline consumed in interstate commerce from that consumed in intrastate commerce, just as it would be impossible to say with any accuracy how much of the coal consumed on a given run of a locomotive pulling a train carrying both interstate and intrastate freight should be allocated to interstate commerce and how much to intrastate commerce.

(a) In *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307, this court said: "But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce."

So in *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346, 347, this court said: ". . . . , a State may not tax, burden or interfere with such commerce. . . ." Furthermore, a tax, regardless of what it may be called, is invalid if, as a

practical matter, it "operates to burden or regulate interstate business."

So in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10, this court said:

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. Minnesota v. Barber, 136 U. S. 313, 319. Brimmer v. Rebman, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift and Co. v. United States, 196 U. S. 375, 398. Lemke v. Farmers Grain Co., 258 U. S. 50, 59. Binderup v. Pathe Exchange, 263 U. S. 291, 309. Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid."

To the same effect see

Panhandle Oil Co. v. *Knox*, 277 U. S. 218, 222.
Colorado v. *United States*, 271 U. S. 153, 162-163.
Texas Transport & Terminal Co. v. *New Orleans*, 264 U. S. 150.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 259.
International Paper Co. v. *Massachusetts*, 246 U. S. 135, 141-142.

(b) Probably as good a yardstick as has been devised to apply the well known rule is this; if there were no intrastate commerce would there be any tax; or to put it another way, does the increase in interstate commerce increase the proposed tax?

This court thus expressed the rule in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470:

> "And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In *Sprout* v. *South Bend*, 277 U. S. 163, 170-171, this court said:

> "A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . . But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not in-

> creased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

So in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297, this court held that the tax there challenged, varying as the volume of foreign commerce varied, was obviously a direct burden upon it and therefore invalid. See also *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, 120.

It is perfectly obvious from the construction placed upon these statutes by the Supreme Court of Tennessee in this particular case that, *if the railroad did no intrastate business at all, the tax would be just the same; that the more gasoline consumed even in interstate commerce alone, the more the tax.*

(c) It may be suggested, in the light of some statements in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, that so much of the tax in question as may relate to gasoline used exclusively in intrastate commerce would be valid. Our answer to that proposition is that, from the very nature of the use of his gasoline, it is impossible to separate that consumed in and for interstate commerce from that consumed in and for intrastate commerce.

The gasoline in question is "not in its nature divisible" and comes within the rule of this court so announced in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647, 648, and *United States* v. *New York Central Railroad Co.*, 272 U. S. 457, 464. See also *Mid Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, and *United States Airways* v. *Shaw*, 43 Fed. (2d) 148.

As aforesaid, the actual uses of this gasoline, as shown by the detailed statements of the original bill (R., 16-18), demonstrate that there is no possible way to separate the amount of gasoline consumed in interstate commerce from that consumed in intrastate business, with the result that the tax as a whole, as applicable to such a railroad as appellant, is invalid.

> The burden imposed by the statutes under attack is not based either on use or sales in Tennessee, so that such cases as *Eastern Air Transport, Inc.*, v. *South Carolina Tax Commission*, 285 U. S. 147, are irrelevant.

The United States District Court in Nashville, in *American Airways, Inc.* v. *Wallace*, 57 Fed. (2d) 877, relied in part on said *Eastern Air Transport* case, and the Tennessee Supreme Court relied exclusively on the decision of said District Court. (R., 8) We think we can demonstrate there is nothing in the decision of this Court in that case inconsistent with our position here.

The gasoline in question was purchased outside of Tennessee and moved in interstate commerce into Tennessee. There a part of it was consumed in railroad operation and a part of it, in practically a continuous movement, went to Kentucky, Alabama and Georgia and was there used in railroad operation. There was no sale of any of the gasoline in question in Tennessee and such of it as was used in Tennessee was used in railroad operation in a manner and to an extent as to make separation between that consumed in intrastate commerce and that consumed in interstate commerce impossible. (R., 16-18)

Eastern Air Transport, Inc. v. *South Carolina Tax Commission,* 285 U. S. 147.

In that case there was involved the validity of a South Carolina statute imposing a privilege tax on corporations "doing domestic or intrastate business within this State," and the amount of tax was measured by the *local sales* within the State. The gasoline was sold by an oil company, which paid the tax and did not complain, but the purchaser filed suit on the theory that it indirectly paid this tax and as it expected ultimately to use the gasoline so purchased in interstate commerce the taxing statute was invalid. This court held the statute valid, saying:

> "The tax is described in the statute as a license tax, which, as applied in the instant case against the dealer, is for the privilege of

> carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. . . . Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. . . . A non-discriminatory tax upon *local sales* in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

We repeat that in the case at bar there were no local sales in Tennessee, either to or by the Railway, so this case is no authority for the action of the Tennessee Supreme Court.

Gregg Dyeing Co. v. *Query*, 52 S. Ct. 631, 286 U. S. 472.

In this case the Gregg Dyeing Company operated the local business of bleaching in Aiken, S. C. South Carolina had a statute imposing a so-called license tax of six cents on gasoline stored or used within the state. It specifically applied to gasoline imported from other states "after the same shall have lost its interstate character." In holding this tax valid against the challenge based on the commerce clause of the Federal Constitution this court said:

"The gasoline has come to rest within the state, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the state has the authority 'to tax the products or their storage or sale.' Texas Co. v. Brown, 258 U. S. 466, 478, 42 S. Ct. 375, 379, 66 L. Ed. 721; Sonneborn Bros. v. Cureton, 262 U. S. 506, 519, 520, 43 S. Ct. 643, 67 L. Ed. 1095; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 49 S. Ct. 188, 189, 73 L. Ed. 475. Not only may *local sales* of gasoline thus brought into the state be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co., 256 U. S. 642, 648, 649, 41 S. Ct. 606, 65 L. Ed. 1139. See Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund, 283 U. S. 788, 51 S. Ct. 352, 75 L. Ed. 1415. *There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation.*. Helson v. Kentucky, 279 U. S. 245, 252, 49 S. Ct. 279, 73 L. Ed. 683; Eastern Air Transport v. South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. Ed. 470, decided March 14, 1932. In view of these well-established principles, we find no ground for concluding that the state could not impose the tax with respect to the gasoline of appellants which was kept within the state for use in their *local enterprises.*"

The gasoline there involved had come permanently to rest—it was not to be transported further—it was not to be used except in "local enterprises." This court was very careful to qualify

the rule as stated for instances involving interstate commerce.

East Ohio Gas Co. v. *Tax Commission,* 283 U. S. 465.

In this case there was involved the validity of an Ohio statute imposing an excise tax on the privilege of carrying on the intrastate business of supplying consumers within the State with natural gas. The tax was measured by the volume of intrastate business and in specific language it excluded receipts "derived wholly from interstate business." This court held that statute valid, saying this:

> "Admittedly the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on intrastate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U. S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U. S. 338, 346. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and

> that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. . . . (470)
>
> "It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State. . . . (471)
>
> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce." (472)

In the case at bar the so-called tax is not measured by local sales or by gas consumed in intrastate commerce. It was held by the Tennessee Supreme Court to apply to all gasoline consumed by the Railway not only in Tennessee but even in the states of Alabama, Georgia, and Kentucky. (R., 11) *If the Railway did only an interstate business, the tax would be just the same.*

We content ourselves now with the mere citation of a few authorities on this general proposition.

State Tax Commission of Mississippi v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41.

Furst v. *Brewster*, 282 U. S. 493, 497-498.

Ohio Oil Co. v. *Conway*, 281 U. S. 146.

International Shoe Co. v. *Shartel*, 279 U. S. 429, 433.
Hart Refineries v. *Harmon*, 278 U. S. 499.
Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555, 565-567.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.
Transcontinental & Western Air, Inc., v. *Lujan*, 8 Pac. (2d) 103.
Prouty v. *Coyne*, 55 Fed. (2d) 289.

***Helson and Randolph* v. *Kentucky*, 279 U. S. 245, seems to control this case.**

If, as aforesaid, we ignore both the actual phraseology and construction of these statutes by the Tennessee Supreme Court and look solely to their practical effect, it is obvious that a tax is imposed upon gasoline consumed in interstate commerce, varying directly with the amount of such commerce. *If there were no intrastate commerce, the tax would be just the same.* It seems, therefore, that the Helson and Randolph case is controlling.

In that case Helson and Randolph operated a ferry boat on the Ohio river between Kentucky and Illinois and the motive power was created by the consumption of gasoline which was purchased in the state of Illinois. Kentucky undertook to impose a tax on the sale or use of the gasoline in Kentucky. A part of the gasoline in question was consumed within the limits of the state of Kentucky. The question was whether the state had the power under the commerce clause of the Fed-

eral Constitution to impose this tax, and this court in holding the state had no such power said:

> "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217; Mayor of Vidalia v. McNeely, 274 U. S. 676, 680. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. Gloucester Ferry Co. v. Pennsylvania, supra, p. 204. A state cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' Leloup v. Port of Mobile, 117 U. S. 640, 648; Lyng v. Michigan, 135 U. S. 161, 166; Ozark Pipe Line v. Monier, 266 U. S. 555, 562. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. Adams Express Com-

pany v. Ohio, 166 U. S. 185, 218. . . . (pp. 248-249)

"The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.' Gloucester Ferry Co. v. Pennsylvania, supra, 214." (p. 252)

If a state cannot tax the actual use of such gasoline, it certainly cannot tax the preliminary steps under the fiction that the carrier was a "storer" or "distributor."

IV.

Our fourth specification of error challenged the power of the state, regardless of everything else, to impose this tax or charge on gasoline temporarily at the Railway's storehouse in its Nashville shops and actually used in railroad operation in Alabama, Kentucky and Georgia.

We must refer again briefly to the facts. The purchasing agent at Nashville buys gasoline for the Railway's system. The sales are not within the State and the gasoline moves interstate in bulk quantities, not immediately to the various points of consumption, but to the general storehouse at Nashville, for the purpose of being inspected by the Railway as to both quality and quantity. (R., 16) This gasoline is used daily and the volume on hand ordinarily is sufficient for some thirty days necessities. (R., 16) Approximately forty per cent of the total volume so purchased moves in interstate commerce into the Nashville shops, then moves out in due course to Kentucky, Alabama, and Georgia, and is there consumed by the Railway in railroad operation in those states. It is a regular course and substantially a continuous movement. (R., 16-17)

The Supreme Court of Tennessee specifically held that this large volume of gasoline, purchased outside of Tennessee, moving practically in continuous shipments through Tennessee, and actually consumed in other states, was subject to this

state tax, "without regard to the place of ultimate use." (R., 11)

Whatever may be said of the gasoline consumed in Tennessee, certainly that State cannot tax gasoline consumed in Georgia, Alabama, and Kentucky, because that gasoline was bought outside of Tennessee, consumed outside of Tennessee, and never lost its interstate character because, temporarily, it had been stopped at the Nashville shops for inspection. Goods may be stopped for compression or milling in transit, or they may be held awaiting a full load, and yet the mere fact that temporarily such goods are not in motion does not deprive them of their interstate character. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35; *Furst* v. *Brewster*, 282 U. S. 493, 498; *Champlain Realty Company* v. *Brattleboro*, 260 U. S. 366; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 513; *Carson Petroleum Company* v. *Vial*, 279 U. S. 95.

This movement through the Nashville shops was substantially continuous and was the regular "course of business." See *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-292; *McFadden, et al.* v. *Alabama Great Southern*, 241 Fed. 562.

The Tennessee Supreme Court gave no reason and cited no authorities for holding that this portion of the gasoline involved was subject to tax by the State of Tennessee. The only case which it

cited (R., 8) did not involve that question. Certainly this gasoline, bought outside of Tennessee and used outside of Tennessee, passing through its general storehouse in Nashville, in a practically continuous movement, to use elsewhere in interstate railroad operation, cannot be taxed by the State of Tennessee in any manner or through any guise or device under such cases as *Airway Corporation* v. *Day*, 266 U. S. 71.

V.

We have undertaken to demonstrate (page 23 supra) that the statutes in question, so far as their actual verbiage is concerned, are perfectly clear and definite and can only be applied to those engaged in the business of selling, storing and distributing gasoline, and that, therefore, they are invalid as applicable to a corporation doing and authorized to do only a railroad business.

There is, however, another canon of construction which must be considered, and that is that the name by which a state may call a tax is not controlling—". . . . , a characterization of the tax by the state court is not binding here," *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 401—"Actual facts govern," *Sprout* v. *South Bend*, 277 U. S. 163—the "practical effect" controls, *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222—it is the "practical operation, not its definition, ... which controls," *Lawrence, et al.* v. *State Tax*

Commission of Mississippi, 52 S. Ct. 556, 557, 286 U. S. 276; in the end it is "substance" and not "form" which controls. *Lacoste et al.* v. *Department of Conservation*, 263 U. S. 545, 550.

The financial burdens imposed by the statutes under attack are in fact charges by the State as compensation for the use of its highways, as distinguished from taxes proper.

On page 1, *supra*, we refer to the "so-called gasoline taxes" because we do not believe that, technically speaking, the burdens imposed by these statutes are properly denominated "taxes." We think that a reading of these statutes clearly shows that the Tennessee General Assembly intended, as a method of financing and constructing its highway system, that those using the same should pay compensation therefor based on the use as measured by the number of gallons of gasoline consumed. The bill shows, and it is admitted by the demurrer, that in their practical operation the charges imposed by these statutes are passed on to the road users and those who actually engage in the gasoline business make public the price of the gasoline proper and then the additional charges under these statutes. (R., 18-20)

(a) "A tax is an enforced contribution to provide for the support of government; . . .", *United States* v. *La Franca*, 282 U. S. 568, 572; but the funds collected under these statutes are "to be used solely in the construction and maintenance of a

highway system in the state" (See caption of said chapter 58, page 73, *infra.*) and do not go into the general funds of the state to pay what is ordinarily called the "cost of government." We do not suggest that the construction of highways is not a governmental function. But there is a clear distinction between an ad valorem tax used to build highways and a charge on a highway user in proportion to the use; and, getting away from phraseology and technicalities, that is what is involved in this case. It should be borne in mind that on all the gasoline which the Railway buys in Tennessee and uses on the public highways it pays the charges in question. (R., 18)

(b) If there be any constitutional principle well settled it is that a state cannot by any device directly burden or tax interstate commerce. But a state may charge one, even engaged exclusively in interstate commerce, a charge for the use of its highway system on which to do business. This is not an exception to the rule because such a charge is not really a tax but compensation for the use of public property. On this point we quote from *Prouty* v. *Coyne*, 55 Fed. (2d) 289, 292, as follows:

> "The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, provided the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. Kane v.

New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 504, 72 L. Ed. 833; 62 A. L. R. 45; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551; Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 51 S. Ct. 380, 382. 75 L. Ed. 953; Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385."

In *Clark* v. *Poor*, 274 U. S. 554, 557, this court said:

> "Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144."

Interstate Transit, Inc., v. *Lindsey*, 283 U. S. 183, clearly recognizes the difference between a tax going to support the cost of government and a charge for the use of the highways to be expended in their construction and maintenance. A charge under that case going into the general fund would not be valid, whereas the same charge used to construct and maintain the highways would be valid.

In *New Jersey Telephone Co.* v. *Board*, 280 U. S. 338, 347, this court said: "Clearly the State,

when passing the Act making the assessment, acted, not as a proprietor demanding compensation for the use of its property, but as sovereign imposing a tax for the support of government."

This can only mean, we believe, that it is one thing to impose a tax to support the government and an entirely different thing to make a charge for the use of the public highways as a place of business.

The following cases recognize the difference in taxes proper and a charge to users of "special facilities" furnished at great expense by the state.

Continental Baking Co. v. *Woodring*, 286 U. S. 352, 52 S. Ct. 595, 599.
Alward v. *Johnson*, 282 U. S. 509, 513-514.
Carley & Hamilton v. *Snook*, 281 U. S. 66, 71.
Bekins Van Lines v. *Riley*, 280 U. S. 80.
Sprout v. *South Bend*, 277 U. S. 163, 170.
Michigan Public Utilities Com. v. *Duke*, 266 U. S. 570.
Hendrick v. *Maryland*, 235 U. S. 610, 622-624.
Boeing Air Transport v. *Edelman*, 51 Fed. (2d) 130.

We submit that the justification of the charges imposed by these statutes was the use of the public highways for transportation purposes, such charges to vary with the use. This is its actual practical effect. (R., 18-20) For the gasoline so

used the Railway pays the charge in question. (R., 18)

(c) But the Railway uses none of this gasoline on the public highways. It is certainly elementary that one who does not use public property cannot be burdened with a special charge for its use. This is not the case of a general tax. Compare *St. Louis & Southwestern Ry.* v. *Nattin*, 277 U. S. 157.

The controlling rule has been applied often in cases involving special assessments in proportion to special benefits. If there be no benefit at all, there can be no assessment. *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478. Nor may the assessment be palpably disproportionate to the benefits.

Kansas City Southern v. *Road Improvement Dist.*, 256 U. S. 658, 661.
Thomas v. *Kansas City Southern*, 261 U. S. 481.
Road Improvement District v. *Missouri Pacific*, 274 U. S. 188, 194.
Standard Pipe Line Co. v. *Miller County Highway & Bridge Dist.*, 277 U. S. 160.

To charge competing common carriers the same rate on gasoline consumed in the transportation business—all the funds so collected being used for the construction and maintenance of the public highways—when one does all of its business on the "special facilities" furnished by the state and the

other none, is arbitrary action and unreasonable discrimination.

VI.

The precise question presented by our sixth specification of error has never, so far as we can find out, been raised. The facts are that Tennessee has several separate statutes imposing tax burdens on common carriers by railroad; and likewise several separate statutes imposing tax burdens on common carriers by motor vehicle.

The money collected from the particular statutes here under attack does not go to defray the cost of government and the railroad gets no direct benefit therefrom. Quite to the contrary such funds are expended in the construction and maintenance of a roadway for the use of common carriers by motor vehicle to compete with appellant Railway, which must furnish its own roadway. This in and of itself would seem to be so arbitrary and unreasonable as to lack due process of law; but the fact is, taking the series of tax statutes applicable to railroads on the one hand and the series of tax statutes applicable to common carriers by motor vehicle on the other, we find gross discrimination, which was thus specified in the bill of complaint:

"VIII

. . . . . .

(b) "All of the funds collected under this series of acts commencing with said Chapter 58 of the 1923 Public Acts go exclusively to the maintenance and construction of the highway

system of the State. None of such taxes go into the general fund of the State and none are available for any except road or similar purposes. No part of these funds are expended for facilities which complainant can or does use. Said tax was intended to be and is in fact passed along to the users of gasoline, most of which are operators of automobiles; and the theory of said series of acts is that thus motor vehicle users pay for the highways in proportion to their respective use.

"Complainant uses none of the gasoline here involved on the public highways but exclusively in the operation of its railroad on its own property, hence complainant is advised and avers, that these acts being intended to ultimately collect from road users in proportion to their use do not apply to the gasoline used by it in running its railroad on its own private property. . . . (R., 19)

IX

"(a) The series of acts here involved commencing with said Chapter 58 of the 1923 Acts constitutes the chief source of current revenues (except repeated bond and note issues) for the construction and maintenance of Tennessee's highway system and the theory thereof, as aforesaid, is that those using the highways shall by this system pay in proportion to their use. None of the gasoline here involved is ever used by complainant or others except on complainant's own private property in the operation of its railroad.

"(b) Complainant is already the subject of gross and, it is believed, illegal discrimination under the laws of Tennessee in the matter of its taxes as compared with its competitors on

the public highways. Under the Tennessee laws now in force motor carriers for hire obtain a highway bought and maintained by the State and governmental protection for approximately, on the average, five cents out of each dollar of gross revenue; while Tennessee railroads for the same thing must, on the average, pay approximately thirty-three cents out of each dollar of gross revenue. In other words, every kind of tax paid by motor carriers for hire (ad valorem, privilege, license, income, registration and gasoline) costs on the average five cents out of each dollar of gross revenue for which such motor carriers for hire receive not only governmental protection (as do all taxpayers including railroads) but a highway to do business on in competition with railroads, said highway being constructed and maintained by the State. To obtain the same thing railroads, on the average, as aforesaid, must pay out approximately thirty-three cents out of each dollar of gross revenue.

"(c) These facts in detail were presented to the last General Assembly and other public officials, were never disputed, are well and generally known, yet the constituted authorities have been and are willing to take no action to remove this palpable and arbitrary discrimination against railroads such as complainant.

"Filed herewith, marked Exhibits numbers 2 and 3, and made a part hereof, but not for copy, are Index numbers 42 and 47 of the detailed data presented by complainant to the 1931 Tennessee General Assembly and to the Interstate Commerce Commission, giving the

details, completely and accurately, as to such discrimination.

"(d) To require complainant (in addition to the disproportionate tax burden it now bears) to pay a tax on gasoline used solely in the operation of its railroad to help construct and maintain a highway for its competitors to use substantially free is, so complainant is advised and avers, a direct burden on interstate commerce, arbitrary discrimination against interstate commerce by railroad, so palpably arbitrary and unreasonable as to lack due process of law and so unreasonably discriminatory as to deny complainant the equal protection of the laws. . . . (R., 19-20)

X.

"(c) All of complainant's properties, lands, improvements thereon, tools, bridges and rolling stock are taxed ad valorem by the State of Tennessee, its counties, cities and special taxing districts; its franchises are so taxed; and it pays a state privilege and income tax on its intrastate operations, so that complainant as shown by said Exhibits 2 and 3 already is taxed about 400 per cent more than its motor vehicle competitors. To require railroads, such as your complainant, to pay, in addition to all general taxes as aforesaid, a privilege tax for using gasoline in the operation of its railroad in order to help construct and maintain highways for its competitors by motor vehicle, which are numerous and in active and successful competition with complainant on every part of its lines in Tennessee, is, so complainant is advised and avers, a direct and illegal burden on interstate com-

merce; arbitrary and unreasonable discrimination against railroads and against interstate commerce by railroads; and so palpably arbitrary, unreasonable and discriminatory that said Chapter 58 of the 1923 Acts, and the amendments thereto, are null and void as violating the 'commerce' clause of the Federal Constitution, the 'law of the land' clause of the Tennessee Constitution, and the 'due process' and 'equality' clauses of the Fourteenth Amendment." (R., 22)

Exhibits numbers 2 and 3 to the original bill (R., 24-26a) show that the actual operation of the two taxing systems applicable to these two competing forms of transportation results in common carriers by motor vehicle paying on the average five cents out of each dollar of gross revenue for governmental protection plus a right of way on which to do business, whereas the same thing costs the railroads 33.21 cents out of each dollar of gross revenue or nearly seven times as much!

The fact that this shocking disparity is due in part to the dereliction of public officials does not change the legal status of the situation. See *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239. Combining the averments of fact in the bill of complaint with these two exhibits, all of which were admitted by the demurrer, the inevitable conclusion is that the railroad's contribution to the support of government in Tennessee, making every allowance for the nature, amount and character of the property and their revenues, is over four hun-

dred per cent greater than that of its competitors using the public highways. The statutes here under attack are a part of this discriminatory system and undertake to make appellant Railway, in addition to all other taxes which it pays, help to directly finance a roadway for its competitors to use to undersell appellant which must furnish all of its own facilities.

(a) Classification in taxation is of course permissible. There is no practicable way to impose exactly the same burden on and give the same benefit to every taxpayer. ". . . A precise scientific uniformity" is neither possible nor necessary. *Lawrence, et al.* v. *State Tax Commission*, 52 S. Ct. 556, 559, 286 U.S. 276. There is a twilight zone of legality, or, to use an expression of Mr. Justice Holmes in *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 23:

> "Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain."

Perhaps there is no better general statement of the law than in *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159-160, where this court said:

> "The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses

of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different maner. It may grant exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, 237; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293; Southwestern Oil Company v. Texas, 217 U. S. 114, 121; Brown-Forman Company v. Kentucky, 217 U. S. 563, 573; Sunday Lake Iron Company v. Wakefield, 247 U. S. 350, 353; Heisler v. Thomas Colliery Company, 260 U. S. 245, 255; Oliver Iron Mining Company v. Lord, 262 U. S. 172, 179; Stebbins v. Riley, 268 U. S. 137, 142. *With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause.* The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary.

> The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

(b) The propositions which we shall undertake to support are these:

Due process of law is nothing more nor less than justice and common sense — the equality clause does not forbid different treatment provided there are reasonable grounds for classification; but the Fourteenth Amendment does interdict state action of any kind which is palpably arbitrary, viciously discriminatory or inconsistent with fundamental principles of equity and fair play. *To make railroads finance their roadways, while the public finances the roadways of their competitors, common carriers by motor vehicle, is not only bad economics but indefensible discrimination.*

Equality of taxation under the Fourteenth Amendment means substantial equality not only of burden but of benefit. To give railroads, for the same degree of taxation, governmental protection only, while giving motor vehicle operators the same governmental protection plus a roadway built, maintained and policed at public expense as a place to do business is so palpably arbitrary as to lack due process of law and so viciously discriminatory as to deny equality under the law. *Unless a*

given tax be general and ad valorem, then what the taxpayer gets as well as what he pays must be considered.

(c) Under the decisions appellant Railway has a right to present the facts to support its charge of arbitrary action and unjust discrimination. *Lawrence, et al.* v. *State Tax Commission*, 52 S. Ct. 556, 558, 286 U. S. 276. The rule was thus stated in *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251, "To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with *disproportionate economic weight* on it. . . ."

Equality of treatment is appellant's right. *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 403. It has shown the facts—the "economic weight" on railroads is over four hundred per cent greater than on its competitors, *due to the fact that the State furnishes a roadway for motor vehicles while railroads must buy, build, maintain and pay taxes on their own.*

(d) The Tennessee Supreme Court on this point merely said: "The tax imposed upon those storing gasoline applies to all alike. The statutes made no discrimination and it does not therefore contravene the provisions of the Fourteenth Amendment." (R., 11-12) It will thus be seen that the Tennessee Supreme Court cited no authority for

its decision and apparently thought that it was limited to the "four corners" of these statutes immediately under attack, *whereas we attack the two tax systems as a whole.* The Tennessee Supreme Court said nothing at all about this. This very question, that is, whether in a claim of discrimination a complainant is limited to one statute or may look to the aggregate effect of a system of statutes, was raised in *Gregg Dyeing Company* v. *Query*, 52 S. Ct. 631, 634, 286 U. S. 472, this court saying:

> "The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the state imposing a tax upon the sale and use of gasoline within the state. The state court said that the act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the state shall put its

requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. Where the Supreme Court of the state has held that two or more statues must be taken together, we accept that conclusion as if written into the statutes themselves. Herbert v. Louisiana, 272 U. S. 312, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102. See Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 73, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

"Reading together the statutes with respect to gasoline taxes, the state court took the view that, as to the gasoline tax with respect to sales within the state, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view."

(e) We have undertaken to show heretofore (page 47, *supra*) that the statutes in question do not levy a tax in the technical sense of an enforced contribution by a citizen or property owner towards the cost of government, but they really charge compensation for the use of the highways, using the money thus collected to build and maintain such highways. This is certainly the rationale of these statutes and is the way they were intended to and do work out in actual practice. (R., 18-20)

We suggest that it is arbitrary action under the due process clause of the Fourteenth Amendment to force the Railway, paying all the taxes

proper imposed upon it, to make a special contribution to build roadways for its competitors to use, based on the volume of gasoline consumed by it *on its own private property in four different states.* Again we repeat that appellant Railway pays these charges for gasoline bought in Tennessee and used by it in its motor vehicles on the public highways. (R., 18) It would seem that this phase of the case is covered by *Myles Salt Company* v. *Iberia and St. Mary Drainage Dist.*, 239 U. S. 478, where this court held that when a drainage district, even when created by legislative action, included property—in that case an island—which could not possibly receive any benefit from the drainage scheme, such inclusion (merely to tax that property for the benefit of others) was inconsistent with the Fourteenth Amendment.

We make in essence the same proposition here. The State of Tennessee is providing a roadway for those engaged in the transportation business by motor vehicle. It makes those who use the roads pay in proportion to the use—and all such payments are segregated and devoted solely to highway purposes.

Here we may properly refer to *Turner* v. *Eslick*, 146 Tenn. 236, 246, wherein was involved the validity of an old state statute providing tolls for horsedrawn vehicles, but not for automobiles, wherein the Court said:

> "To require the payment of toll by those traveling in horse-drawn vehicles, and to exempt from the payment of toll those traveling in automobiles, upon a road where all of them have equal rights, would be a discrimination that could not be justified."

To make railroads pay a tax on gasoline consumed on their own private property in interstate railroad operation for the special benefit of highway users seems to us to be that character of arbitrary action condemned by the Fourteenth Amendment.

This court has never undertaken to circumscribe the due process and equality clauses of the Fourteenth Amendment by exact definition. Arbitrary action and unreasonable discrimination have been interdicted but each particular case must stand or fall by the application of general principles to particular facts. At the risk, possibly, of being tedious we quote from a few of the many decisions showing what these general principles are.

In *Lawrence v. State Tax Commission of Mississippi*, 52 S. Ct. 556, 557-559, 286 U. S. 276, this court said:

> "The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those

domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment.

. . . . . .

"The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, Hattiesburg Grocery Co. v. Robertson, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748; Knox v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689; but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.

. . . . . .

"But the Constitution, which guarantees rights and immunities to the citizens, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided.

. . . . . .

"The burden does not rest on him to test again the validity of the amendment by some procedure to compel his competitors to pay the tax under the earlier statute.

. . . . . .

> "The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

In *Gregg Dyeing Company* v. *Query*, 52 St. Ct. 631, 635, 286 U. S. 472, this Court said:

> "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries."

First National Bank of Hartford v. *Hartford*, 273 U. S. 548, 560, held that state legislation in taxing measures which, regardless of intent, actually discriminated against capital invested in national bank shares was invalid.

In *Pacific Company* v. *Johnson*, 285 U. S. 480, 493, is the following:

> "State taxes which, if non-discriminatory, would be upheld, even though they reach or affect those engaged in interstate commerce, are condemned if they discriminate against those so engaged, by placing on them heavier burdens than those imposed on others within the state."

Cumberland Coal Co. v. *Board*, 284 U. S. 23, recognizes the right of a taxpayer, "with due regard to differences in actual value," to be put on a basis of equality with other taxpayers.

From *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247, we have the following:

> "The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Cumberland Coal Co. v. Board of Revision, supra; Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 514-518; Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98; Sioux City Bridge Co. v. Dakota County, supra. Nor may he be remitted to the necessity of awaiting such action by the state of-

ficials upon their own initiative. Montana National Bank v. Yellowstone County, supra.

"The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them."

So in *Memphis & Charleston Railway Co.* v. *Pace*, 282 U. S. 241, 246, this court said:

"But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, Houck v. Little River District, supra; Valley Farms Co. v. Westchester, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause."

In *Dane* v. *Jackson*, 256 U. S. 589, 598-599, this court said:

"While the nature of the subject does not permit of much finality of general statement, it may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the

> burdens of taxation than that arrived at by the state legislatures (4 Pet. 517; 15 Wall. 319, 109 U. S. 400; 185 U. S. 371, supra); and that where, as here, conflict with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.' (134 U. S. 237; 173 U. S. 615; 239 U. S. 220, supra.)."

See also such cases as *Thomas* v. *Kansas City Southern Railway*, 261 U. S. 481, 483; *Goldsmith* v. *Prendergast Construction Co.*, 252 U. S. 12, 17; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37-40; *Road Improvement Dist.* v. *Missouri Pacific*, 274 U. S. 188, 194.

(f) Such cases as *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 257, are not inconsistent with our theory here. In that case Pennsylvania provided a tax for anthracite coal which had no counterpart in relation to bituminous coal. To some extent these two kinds of coal were used for the same purposes and those producing the same were in competition so it was claimed that to impose this tax on one kind of coal and not on the other denied that equality of treatment guaranteed by the Fourteenth Amendment. The court, however, put its decision on the ground that

> "The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it."

It will be noted that that tax was justified on the ground of material difference in the constituent elements of the two kinds of coal and of their uses. It will also be noted that there was no challenge to the tax system as a whole which is the primary point we make in this respect.

(g) It is easy to say that in relation to taxation the Fourteenth Amendment merely requires common honesty and fair dealing and that a tax which is palpably arbitrary or unduly discriminatory is invalid. All the trouble comes in the practical application.

We must remember, and it is a matter of common knowledge, that transportation by motor vehicle is in direct and effective competition with the railroads. See *Co-ordination of Motor Transportation*, Docket No. 23400, 182 I. C. C. 263. "The effect of motor-truck competition upon rail carriers is so well known as to require no further discussion here." *Consolidated Southwestern Cases*, 185 I. C. C. 357, 361.

Due to the differences in these two forms of transportation obviously they do not have to be taxed exactly in the same way; but after all common carriers by railroad and common carriers by motor vehicle are fundamentally alike. They are engaged in the same business; they haul the same commodities. The "economic weight" of their respective tax burdens (276 U. S. 245, 251) must be fairly comparable. The trouble is that the railroads must buy, construct and maintain their roadways at their own expense and pay taxes thereon; whereas common carriers by motor vehicle have this done for them by the public out of public funds.

It seems so obvious to us that the charges contained in the statutes here under attack were intended solely as compensation for the use of the highways that we cannot doubt that, even looking only to the "four corners" of these particular statutes, it is arbitrary action and unreasonable discrimination to undertake to make a railroad pay its money to build a public highway for its competitor simply because it burns gasoline on its own private roadway.

Going to the main proposition, however, under the authority of the Gregg case, *supra*, this court may consider the two tax systems as a whole. The contribution of common carriers by motor vehicle to government, included in which is the right to use a highway, bought, built and maintained by the

public, is only five cents out of each dollar of gross revenue; while the railroads in Tennessee pay for, in essence, the same thing nearly seven times as much or 33.21 cents out of each dollar of gross revenue. Allowing for a reasonable twilight zone, this disparity in the tax burdens of these two competing forms of transportation seems to us to be so extreme as to constitute both arbitrary action and unreasonable discrimination. That it burdens interstate commerce by railroad is obvious.

Railroads are entitled to equality of treatment under the law. A comparison of the practical results of the two tax systems of Tennessee applicable to these two competing forms of common carriers shows that they do not get it.

We ask that this cause be reversed.

Respectfully submitted,

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Counsel for appellant.

W. A. MILLER,
S. M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
of Counsel.

September 30, 1932.

APPENDIX

CHAPTER NO. 58, ACTS OF 1923

HOUSE BILL NO. 525.

(By Mr. Hall.)

AN ACT requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That as used in this Act the term "person" means and includes every individual, firm, association, joint stock company, syndicate and corporation.

The term "distributor" means and includes every person who engages in the business in the State of refining, manufacturing, producing or compounding gasoline or distillate, and selling the same in this State; and also every person who engages in the business in this State of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this State.

The term "dealer" means and includes every person, other than a distributor who engages in the business in this State, of distributing or selling gasoline or distillate within this State.

SEC. 2. *Be it further enacted*, That every distributor shall, for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this State, in an amount equal to two cents for each gallon of gasoline, and two cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold by him in this State, or shipped, transported or imported by such distributor into, and distributed or sold by him within this State, during such year; provided, however, that no gasoline or distillate distributed or sold by any such distributor in the original packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax, but only such gasoline and distillate as has been sold or distributed by such distributor, after the breaking of the original packages in which the same was shipped, transported or imported into this State shall be included or considered in computing the amount of the privilege tax to be paid by such distributor; provided, fur-

ther, that all gasoline and distillate distributed by any distributor to any of its service stations in this State shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons.

SEC. 3. *Be it further enacted*, That every dealer shall for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in such business in this State, equal to two cents for each gallon of gasoline and two cents for each gallon of distillate sold or distributed by such dealer in this State during such year. Provided, however, that no gasoline or distillate sold or distributed by such dealer, and which was refined, manufactured, produced or compounded and sold by a distributor in this State, and no gasoline or distillate sold by such dealer which, when purchased by him, other than was contained in containers or packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax to be paid by such dealer, but only such gasoline and distillate as was shipped, transported or imported into this State, and purchased by such dealer in the original packages in which so shipped, transported or imported into this State, and then resold

by such dealer after the breaking of such original packages by him, shall be included or considered for the purpose of computing the amount of such privilege tax.

SEC. 4. *Be it further enacted*, That such tax shall be paid in quarterly installments for the quarters ending, respectively, March 31st, June 30th, September 30th, and December 31st, in each year, beginning with the quarter ending June 30, 1923, and the amount of such privilege tax becoming due for each quarter shall be paid to the State Comptroller within thirty days after the end of the quarter for which the same is due.

SEC. 5. *Be it further enacted*, That each distributor shall keep a record in such form as the Commissioner of Finance and Taxation shall require, showing the total number of gallons of gasoline and distillate refined, manufactured, produced or compounded and sold by such distributor within this State during each quarter; or showing the total number of gallons of gasoline and distillate shipped, transported or imported into this State by such distributor; the number of gallons thereof sold in this State in the original packages in which shipped, transported or imported into this State; the number of gallons thereof sold in this State by such distributor, after breaking the original packages in which the same was shipped, transported or imported into this State.

Each dealer shall keep a like record showing the total number of gallons of gasoline and distillate sold by him; the number of gallons of gasoline and distillate so purchased, contained in the original containers or packages in which the same was shipped, transported or imported into this State; the number of gallons so purchased, refined, manufactured, produced or compounded and sold in this State, and such other information as the Commissioner of Finance and Taxation may require. All such records shall at all times during the business hours of the day be subject to inspection by the Commissioner of Finance and Taxation, his agents or employes.

SEC. 6. *Be it further enacted*, That each and every distributor must, within thirty (30) days after the quarter ending June 30, 1923, and within thirty (30) days after the end of each following quarter, make out, in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the State Comptroller, a statement showing the total number of gallons of gasoline and distillate refined, manufactured or compounded and sold by him within this State, or, the total number of gallons of gasoline or distillate shipped, transported or imported into this State by such distributor during such quarter; the number of gallons sold in the original package in which shipped; gallons sold in containers or packages other than the original packages in which the same was shipped, transported or imported into this

State, and such other information as the Commissioner of Finance and Taxation may require; and the total amount due to the State of Tennessee as privilege taxes for such quarter.

Each and every dealer must, within thirty (30) days after the quarter ending June 30, 1923, and within thirty (30) days after the ending of each following quarter, make out in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the State Comptroller, a statement showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter, which was purchased by him in the original packages in which the same was shipped, transported or imported into this State; and the total amount due to the State of Tennessee as privilege taxes for such quarter. Such statement shall be signed and verified by the oath of the individual, or individuals, or by the president, vice-president, treasurer, assistant treasurer, or managing agent in this State of the joint stock company, association, syndicate or corporation making the same.

Any distributor or dealer engaged in or carrying on his business at more than one place or location in this State, may include all such places of business and locations in one statement.

The Comptroller shall file one of such statements in his office and shall deliver the duplicate copy

thereof to the Commissioner of Finance and Taxation.

SEC. 7. *Be it further enacted,* That each distributor and each dealer must, within thirty (30) days after the end of each such quarter, and at the same time the statement required by Section 6 of this Act is delivered to the State Comptroller, pay to the State Comptroller, the amount of the privilege tax shown by such statement to be due for the quarter for which the statement is made and filed.

SEC. 8. *Be it further enacted,* That it shall be unlawful for any distributor or dealer to fail, neglect or refuse to make and file any statement required by the provisions of Section 6 of this Act, in the manner, or within the time therein provided, or to make any such statement false in any particular.

SEC. 9. *Be it further enacted,* That if any distributor or dealer shall fail, neglect or refuse to make any statement required by Section 6 of this Act within the time therein provided, the Commissioner of Finance and Taxation shall, immediately after such time has expired, proceed to inform himself as best he may, regarding the matters and things required to be set forth in such statement, and from such information as he may be able to obtain, to make a statement showing such matters and things, and determine and fix the amount of the privilege tax due to the State

from such delinquent distributor or dealer for such quarter, adding to the amount of such privilege tax a penalty of not exceeding fifty per cent (50%) thereof, and deliver such statement to the State Comptroller, who shall proceed to collect the amount of such privilege tax with penalty added thereto, and interest on the whole thereof, at the rate of six (6) per centum per annum from the date of the making of such statement by the Commissioner of Finance and Taxation until paid. Upon request of the State Comptroller it shall be the duty of the Attorney-General to commence and prosecute to final determination, in any court of competent jurisdiction, an action at law to collect the same. No action shall be maintained by any such distributor or dealer to review, revise or change such statement in any particular or to enjoin the collection of the privilege tax, or any part thereof, and such distributor or dealer shall have no right to pay such privilege tax, or any part thereof, under protest, and maintain any action to recover the same.

SEC. 10. *Be it further enacted*, That every distributor selling any gasoline or distillate in this State, in the original packages in which shipped, transported or imported into this State by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in

the original packages in which the same was shipped, transported or imported into this State.

SEC. 11. *Be it further enacted,* That none of the provisions of this Act shall apply to the sales of gasoline or distillate when sold for, and exported out of the State.

SEC. 12. *Be it further enacted,* That it shall be the duty of the State Comptroller to collect all taxes accruing under this Act and to issue proper receipts therefor and to pay over all taxes so collected to the State Treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the Highway System of the State, and no part of said fund shall be used in any other department or for any other purpose whatsoever.

SEC. 13. *Be it further enacted,* That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed; and that this Act take effect on April 1, 1923, the public welfare requiring it.

Passed March 14, 1923.

F. S. HALL,
Speaker of the House of Representatives.

EUGENE J. BRYAN,
Speaker of the Senate.

Approved March 24, 1923.

AUSTIN PEAY,
Governor.

CHAPTER NO. 67, ACTS OF 1925

SENATE BILL NO. 398.

(Evans, Hill, Maiden.)

AN ACT to amend an Act entitled: "An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State," being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, "or storing or distributing," after the word "selling" in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the caption of Chapter 58 of the Public Acts of 1923, being entitled "An Act requiring all persons, firms, associations, joint stock companies, syndicates, and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State," be amended so as to add after the word "selling" and before the word "gasoline," the words "or storing or distributing."

SEC. 2. *Be it further enacted,* That Section 3 thereof be amended by adding at the end thereof the following: "The tax imposed by this Act shall apply to persons, firms, or corporations, dealers or distributors, storing any of the products mentioned in this Act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use; provided that "sellers" of gasoline and such substitutes thereof and distillates paying the tax herein provided may continue to pay the same computed and paid on the basis of their sales as hereinbefore required and stores and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

SEC. 3. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 10, 1925.

W. F. BARRY,
Speaker of the House of Representatives.

L. D. HILL,
Speaker of the Senate.

Approved April 13, 1925.

AUSTIN PEAY,
Governor.

FILE COPY

OCT 24 19

CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

SUPPLEMENTAL BRIEF ON JURISDICTION ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

FITZGERALD HALL,
Counsel for appellant.

SETH M. WALKER,
W. A. MILLER,
FRANK SLEMONS,
WALTON WHITWELL,
of Counsel

October 25, 1932.

(File No. 36,873)

INDEX.

	PAGE
Preliminary statement	1
Bill of Complaint	2-4
Defensive Pleadings	4
Decisions of the Supreme Court of Tennessee	5
The Statute in question	5-6
Tennessee decisions construing, interpreting and enforcing the Tennessee Declaratory Judgments Act	6-13
United States Supreme Court decisions determining what are and what are not "cases" and "controversies" under Article III of the Federal Constitution	14-30
Brief of argument	31-35
Appendix I. The Tennessee Declaratory Judgments Act	36-40
Appendix II. Jurisdiction and power of Chancery Courts in Tennessee	41
Appendix III. The judiciary article of the Tennessee Constitution	42

TABE OF CASES CITED.

PAGE

Cummings v. *Shipp*, 156 Tenn. 595 ---- 11
Ex Parte Bakelite Corporation, 279 U. S. 438, 454 ---- 15
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464, 467-469, 470 ---- 27
Fidelity National Bank & Trust Co. v. *Swope*, 274 U. S. 123, 131-132 ---- 17
Frazier v. *Chattanooga*, 156 Tenn. 346 ---- 11
Goetz v. *Smith*, 152 Tenn. 451, 465 ---- 9
Harrell v. *American Home Mortgage Co.*, 161 Tenn. 646, 648 ---- 12
Hodges v. *Hamblen County*, 152 Tenn. 395 ---- 9
In re Cumberland Power Co., 147 Tenn. 504 ---- 6
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428, 444 ---- 20
Lake and wife v. *McDavitt*, 81 Tenn. (13 Lea.) 26, 30 ---- 41
Liberty Warehouse Co. v. *Burley Tobacco Growers*, 276 U. S. 71, 89 ---- 20
Liberty Warehouse Co. v. *Grannis*, 273 U. S. 70, 73-74 ---- 16
Miller v. *Miller*, 149 Tenn. 463 ---- 7
Muskrat v. *United States*, 219 U. S. 346 ---- 6, 14
Nashville Trust Co. v. *Dake*, 162 Tenn. 356, 359 ---- 13
New Jersey v. *Sargent*, 269 U. S. 328 ---- 16
Old Colony Trust Co. v. *Commissioner of Internal Revenue*, 279 U. S. 716, 723-725, 727 ---- 24
Parmer v. *Lindsey*, 157 Tenn. 29 ---- 11
Perry v. *Elizabethton*, 160 Tenn. 102, 106 ---- 12
Peters v. *O'Brien*, 152 Tenn. 466 ---- 9
Postum Cereal Co. v. *California Fig Nut Co.*, 272 U. S. 693, 700 21
Sadler v. Mitchell, 162 Tenn. 363, 367 ---- 13
Tutun v. *United States*, 270 U. S. 568, 577 ---- 21
Tennessee Eastern Electric Co. v. *Hannah*, 157 Tenn. 582, 587 12
Texas v. *Interstate Commerce Commission*, 258 U. S. 158, 162 21
Willing v. *Chicago Auditorium*, 277 U. S. 274, 288, 289-290 ---- 22
12 A. L. R. 53-92 ---- 29
50 A. L. R. 42-55 ---- 29
68 A. L. R. 110-134 ---- 29

TABLE OF STATUTES CITED.

Tennessee Constitution, Article VI ---- 6, 32, 41, 42
Tennessee Public Acts, 1923, chapter 29 ---- 2, 5, 30, 31, 32, 36
United States Constitution, Article III ---- 3, 32, 35

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

Versus

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

SUPPLEMENTAL BRIEF ON JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant, The Nashville, Chattanooga & St. Louis Railway, filed its brief on jurisdiction in this court on July 20, 1932. Then on September 30, 1932, it filed its brief on the merits.

This court in its orders of October 10, 1932, set this cause down for argument, a portion of the journal entry being as follows: "The attention of counsel is invited to the question whether a case or controversy is presented, in view of the nature of the proceedings in the state courts." To this question we address ourselves.

The bill of complaint.

The original bill of complaint was filed in the chancery court of Davidson County, Tennessee. (R., 12.) (For the jurisdiction and power of the court see Appendix II, page 41, *infra.*)

The proceeding was under chapter 29 of the 1923 Public Acts of Tennessee known as "The Uniform Declaratory Judgments Act." (R., 13.)

The respondents were the Comptroller of the Treasury, the Commissioner of Finance and Taxation and the Attorney General of the State. (R., 13.)

The suit was brought "to construe said series of statutes to determine whether they require a railroad, such as complainant, to obtain a permit, or to make any bond or bonds, or *to pay any tax* on any gasoline used in railroad operations in Tennessee or elsewhere; and to determine the constitutional validity of said statutes if they be construed as applicable to such a railroad as complainant under the facts hereinafter stated.

Complainant's rights and obligations under said statutes are now actually in issue as will be hereinafter more fully set forth." (R., 28.)

It is thereupon set out that the respondent Comptroller and the respondent Commissioner of Finance and Taxation have in their official capacities, pursuant to their statutory duties, "*called upon complainant to pay to the State of Tennessee*

privilege taxes alleged to be due . . . in the sum of Thirteen Thousand, Three Hundred Eighty-one and 23/100 ($13,381.23) Dollars." (R., 14.)

It is further alleged that "respondents have now determined to undertake *to require complainant* to *pay this sum*, and further sums in the future, which sums complainant claims are not legally due, *and the question at issue is whether such sums are due, or not*, and this calls for a construction of said statutes and of a determination of their validity. . . ." (R., 14.)

The bill thereupon proceeds to set out the facts, which we have elaborated on in our brief of September 30, 1932, on the merits.

The prayer of the bill is as follows:

> "Premises considered, Complainant asks leave to file this bill in this Honorable Court; that the parties named herein as respondents be made such by the service of process compelling them, and each of them to appear at an early rule day of this Court to answer this bill, but not under oath, answer under oath being expressly waived. (R., 23.)
>
> "Complainant prays that the Court determine and declare whether it is obligated to obtain any permit or make any bond or comply with any of the other administrative provisions of said series of statutes; and further that the Court determine and declare whether gasoline temporarily stored in complainant's

shops at Nashville, Tennessee, both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the States of Kentucky, Alabama and Georgia, comes within the purview of any of the administrative or other provisions of this series of statutes. (R., 28-29.)

"Complainant further prays that said Chapter 58 of the 1923 Acts of Tennessee, and the statutes amendatory thereof, be construed to determine whether they apply to such an interstate carrier as complainant, and if so, to determine their validity under the facts and circumstances as hereinbefore set out. (R. 23.)

"Complainant specificially prays that said Chapter 58 of the 1923 Public Acts, as amended, be held invalid to the extent that it may apply to gasoline used by complainant in the operation of its railroad, on the grounds and for the reasons hereinabove set forth. (R., 23.)

"Complainant further prays for such other, further and general relief as it may be entitled to in the premises." (R., 23.)

Defensive pleadings.

The respondents filed a demurrer setting forth various grounds of defense, among others, claiming that the exclusive remedy of the Railway was to pay the tax in question under protest and sue to recover. (R., 29.)

Decisions of the Supreme Court of Tennessee.

The Supreme Court of Tennessee took jurisdiction of the controversy and decided the case on its merits, specifically holding that, as the Railway's challenge to these state statutes under the Federal Constitution was not sound, the obligation to pay as demanded was fixed and binding. (R., 7, 11.)

In the second opinion the Court said:

> "In the memorandum opinion filed April 30, the court affirmed the decree of the Chancellor in which he held *defendant liable for the privilege tax imposed* upon the storage of gasoline in the state." (R., 11.)

The statute in question.

For the convenience of the court chapter 29 of the 1923 Public Acts of Tennessee is copied in full in the appendix, page 36, *infra.*

Section 1 provides in part:

> "That courts of record within their respective jurisdictions shall have the power to declare rights . . . The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

Section 2 provides in part:

> "That any person . . . whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . ."

Section 5 provides that sections 2, 3 and 4 are not intended to limit the general powers conferred in section 1 "in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

Section 7 provides that "All orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees."

Section 9 authorizes trial of issues of fact by jury.

Section 11 requires that all persons with any interest should be made parties, and that, if a statute be attacked as unconstitutional, the Attorney General of the State shall be served with process.

Tennessee decisions construing, interpreting and enforcing the Tennessee Declaratory Judgments Act.

(a) The Constitution of Tennessee limits the jurisdiction of the Tennessee Supreme Court to actual controversies very much in the same way and to the same extent as article III of the Constitution of the United States does the Supreme Court of the United States. (See Appendix III, page 42, *infra*). The Tennessee Supreme Court has strictly construed its powers, citing and relying on such cases as *Muskrat* v. *United States*, 219 U. S., 346. See *In re Cumberland Power Co.*, 147 Tenn., 504.

(b) The Tennessee Declaratory Judgments Act came before the Tennessee Supreme Court for the

first time in *Miller* v. *Miller*, 149 Tenn., 463, and the question was raised whether proceedings under this Tennessee statute constituted such cases and controversies as invoked a proper exercise of the judicial function of the court. The Muskrat case, *supra*, is referred to and quoted at large. Other cases discussing what is meant by "judicial power" were referred to, the court saying in part as follows:

> "In *Muskrat* v. *United States*, *supra*, and the other decisions of the Supreme Court of the United States relied on by the majority in the Anway Case to support its holding that the act there involved was unconstitutional, no actual controversy existed between the opposing parties. An examination of the federal Constitution (article 3, section 2) discloses that the judicial power of the court is limited to cases and controversies. Therefore we do not think that the case of *Muskrat* v. *United States*, and the other federal decisions cited in the majority opinion in the Anway Case, are controlling in the instant cause.
>
> "Without further elaboration, we are of the opinion that the act under consideration does not violate any provision of our constitution, and is therefore a valid statute.
>
> "As to the necessity of a bona fide controversy as to which the judgment will be *res judicata*, it was announced in *Russian Commercial & I. Bank* v. *British Bank* (Eng.), reported in 19 A. L. R., 1101, that the rule in Scotland, where the action of declarator has existed for hundreds of years, is that the question must be a real, and not a theoretical, ques-

tion; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought." (484-485.)

. . . . . .

"In the court of appeal, Lord READING, C. J., referring to *Guaranty Trust Co.* v. *Hannay*, reported in 12 A. L. R. 1, said:

" 'I think the plaintiffs were interested in the subject-matter, as were also the defendants. I find no authority which would preclude the court from making the declaration. Indeed, in both decisions relied upon, I find support for the proposition that in an exceptional case where it is reasonably necessary for the purpose of doing justice, and where the declaration is sought by a party who is interested in the subject-matter of the litigation, the court could and should make the order. . . .'

"It follows, therefore, from the foregoing authorities, that the only controversy necessary to invoke the action of the court and have it to declare rights under our declaratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right is invaded, or wrong done. The purpose of the act, as expressed in section 12 thereof, is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'

> "The court may, however, refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." (486-487.)

(c) In *Goetz* v. *Smith*, 152 Tenn., 451, 465, the Tennessee Supreme Court declined to pass on certain questions presented in a suit under the Tennessee Declaratory Judgments Act, saying:

> "In the present litigation there is no one before the court adversely affected by such provisions of the act, and no one who has any real interest to raise such questions under the Declaratory Judgments Statute. A declaration upon these matters will, therefore, not be made."

(d) In *Peters* v. *O'Brien*, 152 Tenn., 466, the Tennessee Supreme Court held that the Attorney General of the State was a proper party in certain proceedings under the Tennessee Declaratory Judgments Act.

(e) In *Hodges* v. *Hamblen County*, 152 Tenn., 395, the Tennessee Supreme Court declined to consider, under the Tennessee Declaratory Judgments Act, questions that were not active controversies between parties with antagonistic interests, saying in part:

> "In *Miller* v. *Miller*, 149 Tenn., 463, 261 S. W., 965, this court adopted the Scotch rule with reference to the action of declarator,

long prevailing in that jurisdiction, referred to in *Russian Commercial & I. Bank* v. *British Bank* (House of Lords), 19 A. L. R., 1101, and held that to justify a declaration 'the question must be a real, and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought.'

"*The questions here submitted do not meet this test. They are purely theoretical.** The full membership of the county court of Hamblen county has qualified, and is attending the sessions of that tribunal. Now that the eight magistrates, who delayed their qualification, have assumed the duties of office, it is improbable they will neglect such duties and absent themselves from the meetings of the court. The ten complainants have no real interest in a declaration of their power, apart from other members of the court, to transact business for the court, since the other members are participating in the court's deliberations. The statute does not contemplate declarations upon remote contingencies.

"In other words, the questions submitted arise out of a closed incident. The ten complainants attempted no official action during the filibuster, and the validity of no action or probable action of theirs or others is involved. A declaration from us, therefore, could only serve as an expression upon a supposititious dispute. Moreover, it would be a declaration upon a question in which, if it ever does arise, the particular parties now before the court may have no interest whatever—a question purely abstract and theoretical.

*All italics ours.

"The practice of rendering declaratory judgments has been in vogue in England and Scotland for many years, but we find no case that would justify us in going to the lengths that we are here asked to proceed.

"Parties are not entitled to an expression of opinion to help them in another transaction. *Barwick* v. *Southeastern & Co. R. Co.*, (1921) 1 K. B., 187.

"A declaration should not be made on an abstract question. *Gray* v. *Spyer* (1921), 2 Ch., 549.

"Nor on remote and incidental questions. *In re Toronto R. Co.* (1920), 48 Ont. L. Rep., 319.

"For the reasons stated, this appeal must be dismissed." (398-400.)

(f) In *Frazier* v. *Chattanooga*, 156 Tenn., 346, the court recognized that the word "declaration" in the Tennessee Declaratory Judgments Act was substantially the equivalent of an ordinary decree in a chancery proceeding.

(g) In *Cummings* v. *Shipp*, 156 Tenn., 595, the Tennessee Supreme Court held that there could be no proceedings under the Tennessee Declaratory Judgments Act unless there were real parties before the court with direct and adverse interests in the subject matter to be determined.

(h) In *Parmer* v. *Lindsey*, 157 Tenn., 29, the decree in a proceeding under the Tennessee Declaratory Judgments Act fixed the liability of the several complainants to pay privilege taxes.

(i) In *Tennessee Eastern Electric Co.* v. *Hannah*, 157 Tenn., 582, 587, the jurisdiction of the court under the Tennessee Declaratory Judgments Act was challenged and that court held that it had jurisdiction, saying:

> "Parties representing real interests were thus arrayed on both sides of a substantial controversy."

(j) In *Perry* v. *Elizabethton*, 160 Tenn., 102, 106, the court declined to take jurisdiction in a suit under the Declaratory Judgments Act, saying in part:

> "To authorize a taxpayer to maintain a suit under the Declaratory Judgments Law, to determine the constitutionality of a charter provision of a municipal government, he must have a 'real interest' in the subject of the litigation, and this real interest is in nowise different from that which he must have to enjoin a proposed municipal action on the ground of illegality. We see no ground for any distinction in the interest which would authorize the one suit from the interest which is necessary to the other.
>
> "It results that the appellant fails to show himself entitled to maintain his bill, and appeal, both because of an absence of sufficient interest in the litigation and because of an absence of parties possessing adverse interest."

(k) In *Harrell* v. *American Home Mortgage Co.*, 161 Tenn., 646, 648, the court declined to take

jurisdiction of a proceeding under the Tennessee Declaratory Judgments Act, saying "Quite obviously without the necessary parties before the Court no declaratory judgment or decree may be had."

(l) In *Nashville Trust Company* v. *Dake*, 162 Tenn., 356, 359, the court, referring to the Tennessee Declaratory Judgments Act, said: "The Court will not declare future rights, or decide upon and determine contingencies which may or may not ever arise."

(m) In *Sadler* v. *Mitchell*, 162 Tenn., 363, 367, the court declined to pass on certain questions under the Tennessee Declaratory Judgments Act because certain proper parties were not before the court. That "declarations" under this statute are not merely advisory is demonstrated by the following portion of the opinion in this cause, to-wit:

> "*Since a declaration under the statute has the force and effect of a final judgment* or *decree*, we think we should no more make a declaration against this foreign administratrix than we would render a decree against her with respect to the distribution of the estate."

United States Supreme Court decisions determining what are and what are not "cases" and "controversies" under Article III of the Federal Constitution.

(a) In *Muskrat* v. *United States*, 219 U. S., 346, (a case consistently followed, as shown *supra*, by the Tennessee Supreme Court) this court defined its judicial power in the following words:

> "As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep., 241, 255. Of these terms that learned Justice said:
>
> 'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall., 431, 432; 1 Tuck. Bl. Comm. App., 420, 421. By cases and controversies are intended the

> claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.' " (356-357.)

Further on the court says:

> "That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction . . . (361). It is true the United States is made a defendant to his action, but it has no interest adverse to the claimants." . . . (361.) Such judgment will not conclude private parties, when actual litigation brings to court the question of the constitutionality of such legislation." (362.)

(b) In *Ex Parte Bakelite Corporation*, 279 U. S., 438, 454, there was a discussion by this court of the difference in jurisdiction between constitutional and legislative courts, wherein it was said, among other things: "A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III."

(c) In *New Jersey* v. *Sargent*, 269 U. S., 328, the State of New Jersey filed a suit against the Attorney General of the United States and the members of the Federal Power Commission to obtain a judicial declaration as to the constitutional validity of certain portions of the Federal Water Power Act. A motion was made to dismiss the case on the ground that no judicial controversy was presented. The bill failed to show any right of the State of New Jersey, which was, or was about, to be adversely affected by the enforcement of said Federal statute. This Court dismissed the bill on the ground that the only thing sought was an academic determination of the validity of certain portions of a federal act.

(d) In *Liberty Warehouse Company* v. *Grannis*, 273 U. S., 70, 73-74, a proceeding was instituted in the United States District Court for the Eastern District of Kentucky, under the Kentucky Declaratory Judgment Law. This Court affirmed the judgment below, dismissing the petition for want of jurisdiction, saying in part:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, *there is no*

semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.

"The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court." (73-74.)

(e) In *Fidelity National Bank & Trust Company* v. *Swope*, 274 U. S., 123, 131-132, 133-134, there was involved the question as to whether the controversy was of that character which the Supreme Court of the United States under Article III of the Constitution would take jurisdiction, this court saying in part:

"That this proceeding authorized by Sec. 28 of the Kansas City charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an

adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436 Mo. Rev. Stat. 1919; *Schmelzer* v. *Kansas City*, 295 Mo., 322. These questions are required to be determined in a trial in accordance with the laws and constitution of the State. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See *Keller* v. *Potomac Elec. Co.*, 261 U. S., 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & Pac. Ry. Co., supra.* They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. We do not think significant the fact that under Sec. 28 the city might pay, though it did not, a part of the cost of the improvement and that the council, in authorizing the special tax, is required to deduct from the estimated cost the

amount which may be paid by the city. These provisions could not restrict the authority or capacity of the court to pass upon the validity of the benefit district and the special tax actually authorized by the ordinance.

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. (131-132.)

. . . . . .

The present statute admits of no such construction. The proceeding is in terms directed to be "against the respective owners of land chargeable under the provisions of this section with the cost of such work," and the specific issue to be determined by the judgment of the court is whether or not the respective tracts in the benefit district shall be charged with the lien as provided by the ordinance. The court is directed to render judgment "either validating such ordinance, and proposed lien against the lots, . . . within said benefit district or against such lots, . . . as the court may find legally chargeable, . . . or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal." The plain effect of these provisions is to authorize the court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially as against the property owners in the district the validity of such action and of the liens established or to be estab-

lished conformably to the statute on the specific property described.

The issues presented and the subject matter are such that the judicial power is capable of acting upon them. There is no want of adverse parties necessary to the creation of a controversy as in *Muskrat* v. *United States*, 219 U. S., 346. The judgment is not merely advisory as in *Liberty Warehouse Co.* v. *Grannis*, 273 U. S., 70; *New Jersey* v. *Sargent*, 269 U. S., 328; *Fairchild* v. *Hughes*, 258 U. S., 126; *Massachusetts* v. *Mellon*, 262 U. S., 447; *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162. It operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings. So far as it affects owners of land in the benefit district who are citizens of other states, the controversy is a "suit" which may be removed to the federal courts. Jud. Code, Sec. 28; *Road District* v. *St. Louis Southwestern Ry.*, 257 U. S., 547.

That the judgment is binding on the parties and their privies and hence not open to collateral attack would seem to be the only reasonable construction of the statute if that question were for us to decide." (133-134.)

(f) In *Liberty Warehouse Company* v. *Burley Tobacco Growers*, 276 U. S., 71, 89, it was held that "this Court has no jurisdiction to review a mere declaratory judgment."

(g) In *Keller* v. *Potomac Electric Power Co.*, 261 U. S., 428, 444, there was involved the power of the Congress to invest this court with certain

legislative functions. In holding that there was no such power the following was said:

> "Such legislative or administrative jurisdiction, it is well settled can not be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States*, 219 U. S., 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies."

See, also, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 693, 700.

(h) Judicial action, which may be the subject of litigation in this court, may be invoked not only in cases involving property and property rights but mere status. See *Tutun* v. *United States*, 270 U. S., 568, 577.

(i) In *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162, this court said:

> "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."

(j) In *Willing* v. *Chicago Auditorium*, 277 U. S., 274, 288, 289-290, this Court held that relief by mere declaratory judgment is beyond the jurisdiction of the federal judiciary, saying in part:

> "There is not in the bill, or in the evidence, even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised premises authorized by the leases. *There was neither hostile act nor a threat.* . . ." (288.)
>
> "What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S., 70, 74. Compare *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.*, 276 U. S., 71. The statement, made at the bar, that *Blair* v. *Chicago*, 201 U. S., 400, 450, supports the jurisdiction, is unfounded.
>
> "It is true that this is not a moot case, like *Singer Manufacturing Co.* v. *Wright*, 141 U. S., 696, and *United States* v. *Alaska S. C. Co.*, 253 U. S., 113; that, unlike *Keller* v. *Potomac Electric Co.*, 261 U. S., 428, 444, and *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 693, the matter which it is here sought to have determined is not an adminis-

trative question; that the bill presents a case which, if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike *Gordon* v. *United States*, 117 U. S., 697, a final judgment might be given; that, unlike *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S., 300, the parties are adverse in interest; that, unlike *Fairchild* v. *Hughes*, 258 U. S., 126, and *Massachusetts* v. *Mellon*, 262 U. S., 447, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike *New Jersey* v. *Sargent*, 269 U. S., 328, the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in *Muskrat* v. *United States*, 219 U. S., 346, 361, and *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162. But still the proceeding is not a case or controversy within the meaning of Article III of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter, *Cross* v. *De Valle*, 1 Wall., 1, 14-16. Compare *Jackson* v. *Turnley*, 1 Drew, 617, 627; *Rooke* v. *Lord Kensington*, 2 K. & J. 753, 760; *Lady Langdale* v. *Briggs*, 8 DeG. M. & G., 391, 427.

"As the proceeding is not a suit within the meaning of Sec. 28 of the Judicial Code, the motions to remand the cause of the state court should have been granted." (289-290.)

(k) In *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, 279 U. S., 716, 723-725, 727, there was involved the question as to whether the review of a decision of the Board of Tax Appeals presented a "case or controversy," under Article III of the Federal Constitution. In holding that this was a justiciable case this court said in part:

"It is not necessary that the proceeding to be judicial should be one entirely *de novo;* it is enough that, before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features. What these are has been often declared by this Court. Perhaps the most comprehensive definitions of them are set forth in *Muskrat* v. *United States*, 219 U. S., 346, 356, where this Court entered into the inquiry what was the exercise of judicial power as conferred by the Constitution. There was cited there a definition by Mr. Justice Field, in *Re Pacific Railway Commission*, 32 Fed., 241, 255, which has been generally accepted as accurate. He said:

'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall.,

431, 432; 1 Tuch. Bl. Comm. App., 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.'

In *Osborn* v. *United States Bank*, 9 Wheat., 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

'This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.'

The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the *Bakelite* case, *supra*, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it. *La*

> *Abra Silver Mining Co.* v. *United States*, 175 U. S., 423, 457, 461. The case of *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S., 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it. (723-725.)
>
> . . . . . .
>
> The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection." (727.)

(1) In *Federal Radio Commission* v. *General Electric Co.*, 281 U. S., 464, 467-469, 470, this Court held that it had no power under Article III of the Federal Constitution to give a mere advisory decision, saying in part:

> "We think it plain from this resume of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field. The court's province under that provision is essentially the same as its province under the legislation which up to a recent date permitted appeals to it from administrative decisions of the Commissioner of Patents. Indeed, the provision in the act of 1927 is patterned largely

after that legislation. And while a few differences are found, there is none that is material here.

"Referring to the provisions for patent appeals this Court said in *Butterworth* v. *Hoe*, 112 U. S., 50, 60, that the function of the court thereunder was not that of exercising ordinary jurisdiction at law or in equity, but of taking a step in the statutory proceeding under the patent laws in aid of the Patent Office. And in *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S., 693, 698, which related to a provision for a like appeal in a trade-mark proceeding, this Court held: 'The decision of the Court of Appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes.' Another case in point is *Keller* v. *Potomac Electric Power Co.*, 261 U. S., 428, 442-444, which involved a statutory proceeding in the courts of the District of Columbia to revise an order of a commission fixing the valuation of the property of a public utility for future rate-making purposes. There this Court held that the function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory, because it was that of instructing and aiding the commission in the exertion of power which was essentially legislative.

"In the cases just cited, as also in others, it is recognized that the courts of the District

of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.

"But this Court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. . . . (467-469.)

"Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court." (470.)

(m) Approximately half of the states now have these declaratory judgment acts. They are not all worded alike. In some instances mere advisory opinions are given. *In others, as in Tennessee, there must be real issues, real parties, and the declaration is the equivalent of a decree which finally settles the point or points at issue.* In the notes to A. L. R. there are long and interesting discussions of these various statutes. See 12 A. L. R., 53-92; 50 A. L. R., 42-55; 68 A. L. R., 110-134.

From an inspection of some of these statutes as construed by their state courts it will be readily seen that they differ widely from the Tennessee Declaratory Judgments Act as construed by the Tennessee Supreme Court.

The bill of complaint had adverse parties, with direct and adverse interests. *The respondent public officials, acting under statutory power called on the Railway to pay a fixed sum as taxes already due.* The Railway denied this obligation on the ground that the statutes imposing the taxes were either not applicable to it or if applicable invalid. ". . . the question at issue is whether such sums are due or not. . . ." (R., 14.)

The prayer of the bill calls for process as in ordinary judicial proceedings. Answer was required. Process was served. (R., 27.)

In other words, in this case a citizen and a taxpayer has been formally called on by the proper public officials to pay taxes alleged to be due now. The taxpayer denies liability. *Suit is brought to determine that liability.* The question is not an academic one; the amount involved is fixed and certain; the demand to pay has been made; and the question at issue is whether payment is legally due. The taxpayer filed a bill and the public officials obligated by law to collect are made respondents. Process is served in the ordinary way. *The court is asked to determine whether the Railway owes the tax actually claimed or not. And the Tennessee Supreme Court decided that question.* (R., 11.)

We have shown that the Tennessee Declaratory Judgments Act by its own words provides for the

determination of rights, and that this may be done by a declaration either in the affirmative or negative. Further, that the *judgment or decree will terminate the controversy.* Trials by jury may be had under the Act and issues of law and fact both are thus finally determined.

The Tennessee Supreme Court has powers under the Tennessee Constitution fairly comparable in this respect to the powers of this court under the Federal Constitution. See page 6, *supra.*

In construing this Declaratory Judgments Act the Tennessee Supreme Court declines to merely give advice. It will not take jurisdiction unless actual parties—and all of them—are before the court representing direct and adverse interests on actual as distinguished from academic issues. Quotations from these cases have been set forth at large from pages 6 to 14, *supra.* There is no federal case where the situation is as actually presented here where this court has declined to take jurisdiction. There is existing an actual and acute controversy. *A tax gatherer proceeding under the law has demanded that a citizen pay a specific sum as taxes based on past facts.* That citizen denies its obligation to pay and suit is filed to have determined the legal obligation to pay (R., 14)—and this certainly under all the decisions is a justiciable question.

There is no doubt that the proper parties are before the court—the proposed taxpayer on the

one hand and the officially designated tax gatherers on the other.

This is no academic dispute. The amount involved has been fixed on the basis of past facts and *demand to pay* has been made. (R., 14.)

Decisions of the Tennessee Supreme Court above quoted show the diligence of that court in avoiding giving mere advisory opinions. It requires, always, as in the instant case, an actually present controversy, with all the proper adverse parties before the court, and when decision is made it is final and further proceedings are not necessary.

Jurisdiction cannot be denied on the theory that the action of the state courts was legislative because these courts were not, as in a rate case, preparing for the future but, on the contrary, they were to determine—and did determine (R., 11)—on the basis of past facts, the present liability of a corporation to pay taxes in a fixed and definite amount which had been formally demanded by the official tax gatherer. (R., 14.)

Nor can jurisdiction be denied on the theory that the procedure in this cause was administrative—the question was whether the Railway owed as taxes a specific sum of money formally demanded by the official tax collector. (R., 14.) *The liability of a citizen to presently pay taxes officially demanded is certainly a judicial question.*

This is neither a moot nor academic case—there has been a formal demand by the duly authorized public officials, acting pursuant to law, upon the Railway to pay taxes to the State of Tennessee in the sum of $13,381.23 (R., 14), and the Railway must pay unless this court holds that the Tennessee statutes imposing these taxes violate, as to the Railway, the Federal Constitution.

The judgment invoked in these proceedings was not advisory; on the contrary the judgment settled an actual controversy between adverse interests properly before the court and the judgment finally determined existing rights and obligations. Pursuant to that judgment, affirmed by the Supreme Court of Tennessee, this Railway must actually pay taxes on the basis of past transactions unless this court holds the taxing statutes to be invalid as claimed by the Railway.

The decision of the Tennessee Supreme Court in this cause which we ask to be reviewed is now the law of Tennessee binding on all taxpayers and all tax gatherers to which the statutes under attack are applicable. *The Railway's obligation to pay a specific sum, to-wit, $13,381.23, as taxes, has been finally determined unless this court gives it relief.* (R., 11.)

We respectfully submit that this is a proceeding over which this court under the judiciary article of the Federal Constitution has jurisdiction.

Respectfully submitted,

Counsel for appellant.

SETH M. WALKER,
W. A. MILLER,
FRANK SLEMONS,
WALTON WHITWELL,
of Counsel

October 25, 1932.

APPENDIX.

TENNESSEE PUBLIC ACTS, 1923.

CHAPTER NO. 29

HOUSE BILL NO. 82.

(By Mr. Cooper.)

AN ACT concerning and regulating declaratory judgments and decrees and to make uniform the law relating thereto.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

SEC. 2. *Be it further enacted*, That any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise

and obtain a declaration of rights, status or other legal relations thereunder.

SEC. 3. *Be it further enacted,* That a contract may be construed either before or after there has been a breach thereof.

SEC. 4. *Be it further enacted,* That any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que* trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

SEC. 5. *Be it further enacted,* That the enumeration in Sections 2, 3 and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree

he controversy or remove an un-

further enacted, That the court
nder or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

SEC. 7. *Be it further enacted*, That all orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees.

SEC. 8. *Be it further enacted*, That further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

SEC. 9. *Be it further enacted*, That when a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

SEC. 10. *Be it further enacted*, That in any proceeding under this Act the court may make such award of cost as may seem equitable and just.

SEC. 11. *Be it further enacted*, That when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

SEC. 12. *Be it further enacted*, That this Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be literally construed and administered.

SEC. 13. *Be it further enacted*, That the word "person," wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

SEC. 14. *Be it further enacted*, That the several sections and provisions of this Act except Sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or

will terminate the controversy or remove an uncertainty.

SEC. 6. *Be it further enacted*, That the court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

SEC. 7. *Be it further enacted*, That all orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees.

SEC. 8. *Be it further enacted*, That further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

SEC. 9. *Be it further enacted*, That when a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

SEC. 10. *Be it further enacted*, That in any proceeding under this Act the court may make such award of cost as may seem equitable and just.

SEC. 11. *Be it further enacted*, That when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

SEC. 12. *Be it further enacted*, That this Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be literally construed and administered.

SEC. 13. *Be it further enacted*, That the word "person," wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

SEC. 14. *Be it further enacted*, That the several sections and provisions of this Act except Sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or

feature thereof shall not effect or render the remainder of the Act invalid or inoperative.

SEC. 15. *Be it further enacted*, That this Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees.

SEC. 16. *Be it further enacted*, That this Act may be cited as the Uniform Declaratory Judgments Act.

SEC. 17. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed February 9, 1923.

F. S. HALL,
Speaker of the House of Representatives.

EUGENE J. BRYAN,
Speaker of the Senate.

Approved February 16, 1923.

AUSTIN PEAY,
Governor.

APPENDIX II.

JURISDICTION AND POWER OF CHANCERY COURTS IN TENNESSEE.

Section 6088 of Thompson's Shannon's Code, which was section 4279 of the Code of Tennessee, is as follows:

"The Chancery Court shall continue to have all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity by existing laws."

Construing this section of the statute and defining the power and jurisdiction of a court of chancery, this court in Lake and Wife v. McDavitt, 81 Tenn. (13 Lea) 26, 30 said:

"It possesses, except where changed by statute, the jurisdiction which was exercised by the Lord Chancellor of England, as an equity judge, denominated his extraordinary jurisdiction."

APPENDIX III.

CONSTITUTION OF THE STATE OF TENNESSEE.

Article VI.

SECTION 1. The judicial power of this State shall be vested in one Supreme Court, and such Circuit, Chancery and other inferior courts as the legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.